

77 Am. Jur. 2d Veterans and Veterans Laws IV Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

IV. Payment of Benefits

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest


West's Key Number Digest, [Armed Services](#)  104.1 to 104.3(5), 126, 127

West's Key Number Digest, [United States](#)  96

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  104.1 to 104.3(5), 126, 127

West's A.L.R. Digest, United States  96

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End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 36

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

IV. Payment of Benefits

§ 36. Payment of veterans' benefits, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  104.1 to 104.3(5)

There is a specific statutory prohibition, with certain exceptions, against the duplication of veterans' benefits.¹ Thus, any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive a pension or compensation under the laws administered by the Secretary of Veterans Affairs if such person were not receiving such retired or retirement pay, must waive an equal amount of the retired or retirement pay in order to be entitled to receive the veterans' pension or compensation.²

The right, manner, and effect of renouncing pension, compensation, or dependency and indemnity compensation under any of the laws administered by the Secretary by any person entitled to such benefits,³ and the rules for apportioning veteran's benefits to the veteran's spouse and family,⁴ are also governed by statute.

The Secretary must deny the application or terminate the payment of compensation or pension to a person who fails to furnish the Secretary with a Social Security number or taxpayer identification number (TIN) required to be furnished pursuant to law.⁵ The Secretary may thereafter reconsider the application or reinstate payment of compensation or pension, as the case may be, if such person furnishes the Secretary with such Social Security number or TIN.⁶

CUMULATIVE SUPPLEMENT

Statutes:

[38 U.S.C.A. § 5101\(c\)](#), as amended effective January 5, 2021, provides: (1) Notwithstanding any law regarding the licensure of health care professionals, a health care professional described in [38 U.S.C.A. § 5101\(c\)\(2\)](#) may conduct an examination pursuant to a contract entered into under [38 U.S.C.A. § 5101\(a\)](#) at any location in any state, the District of Columbia, or a

Commonwealth, territory, or possession of the United States, so long as the examination is within the scope of the authorized duties under such contract. (2) A health care professional described in this paragraph is a physician, physician assistant, nurse practitioner, audiologist, or psychologist, who (A) has a current unrestricted license to practice the health care profession of the physician, physician assistant, nurse practitioner, audiologist, or psychologist, as the case may be; (B) is not barred from practicing such health care profession in any state, the District of Columbia, or a Commonwealth, territory, or possession of the United States; and (C) is performing authorized duties for the Department of Veterans Affairs pursuant to a contract entered into under [38 U.S.C.A. § 5101\(a\)](#).

[END OF SUPPLEMENT]

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Footnotes

1 [38 U.S.C.A. § 5304](#).

2 [38 U.S.C.A. § 5305](#).

3 [38 U.S.C.A. § 5306](#).

4 [38 U.S.C.A. § 5307](#).

The record supported a determination by the Board of Veteran's Appeals that an increase in the apportionment of veteran's disability benefits for his minor children was not warranted; the veteran was already providing \$350 to the children from his VA benefits, totaling \$1,225, and \$354 from his \$678 in Social Security benefits, and was also providing \$300 monthly in child support and \$200 in alimony; his expenses already approximated his total income of \$1,835. [Costa v. West, 11 Vet. App. 102 \(1998\)](#).

5 [38 U.S.C.A. § 5101\(c\)\(2\)](#), referring to [38 U.S.C.A. § 5101\(c\)\(1\)](#).

6 [38 U.S.C.A. § 5101\(c\)\(2\)](#).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 37

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

IV. Payment of Benefits

§ 37. Nonassignability and exempt status of payments; liability to attachment, levy, or seizure

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [104.1](#) to [104.3\(5\)](#)

With exceptions, payments of benefits due or to become due under any law administered by the Secretary of Veterans Affairs may not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary will be exempt from taxation, will be exempt from the claim of creditors, and will not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.¹ Apportionment of reduced disability compensation to a veteran's dependents because the veteran's disability compensation has been reduced on the basis of his or her incarceration does not violate the statute prohibiting an assignment of disability benefits; only the payments of benefits due or to become due are subject to the nonassignability provision, and where an incarcerated veteran's compensation has been properly reduced, the only payments due him or her are the reduced payments.²

A state statute construed by state courts as authorizing an award of child support from a veteran's disability benefits was not preempted by the predecessor to the currently applicable federal statute, providing that veterans' benefits payments are not liable to attachment, levy, or seizure, the federal statute being construed as not applying to shield veterans' disability payments from seizure under an otherwise valid child-support order.³

CUMULATIVE SUPPLEMENT

Cases:

Decision of Court of Appeals for Veterans Claims that separation agreement sanctioned by state court played no role in determination of ex-wife's entitlement to special apportionment of veteran's disability compensation benefits for period when they were still married but living separately until date of their divorce did not impermissibly preempt New York domestic relations law, since federal agency's adjudication of claim for federal benefits did not conflict with state domestic relations law;

no New York domestic relations law applied to veteran's disability compensation benefits. [38 U.S.C.A. § 5307\(a\)\(2\)](#); [38 C.F.R. § 3.451](#). [Batcher v. Wilkie](#), 975 F.3d 1333 (Fed. Cir. 2020).

State child support statute, which included federal veterans' disability benefits in its definition of gross income, was not preempted by federal law, which prohibited attachment, levy, or seizure of veteran's benefits and which excluded benefits from the definition of remuneration for employment; exception under federal law existed in the context of child support to the statutory prohibition against attachment, levy, or seizure of benefits, and once funds were delivered to veteran, state court could require that veteran use them to satisfy child support order. [U.S. Const. art. 6, cl. 2](#); [38 U.S.C.A. § 5301\(a\)\(1\)](#); Social Security Act § 459, [42 U.S.C.A. § 659\(a\)](#); [N.H. Rev. Stat. Ann. § 458-C:2](#). [Matter of Braunstein](#), 236 A.3d 870 (N.H. 2020).

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Footnotes

- 1 [38 U.S.C.A. § 5301\(a\)\(1\)](#).
A state statute conflicted with the purposes and objectives of the federal statute prohibiting the attachment, levy, or seizure of veteran's disability benefits, and thus was void under the Supremacy Clause, to the extent that the state statute allowed prison officials to deduct from an inmate account funds derived from the inmate's Veterans Administration disability-benefits check to pay a mandatory assessment in favor of a crime victims compensation board. [Higgins v. Beyer](#), 293 F.3d 683 (3d Cir. 2002).
The statutory exemption for payments of veterans' benefits "due or to become due under any law administered by the Secretary" could be utilized by a veteran's widow in order to exempt proceeds that she received under a special type of National Service Life Insurance purchased by her husband; the exemption extended to protect benefits not just from the claims of veteran's creditors but from the claims of creditors of any person to whom the award was made. [In re Smith](#), 242 B.R. 427 (Bankr. E.D. Tenn. 1999).
Military retirement pay and disability benefits that a Chapter 13 debtor, a retired Navy enlisted man, would receive in the future were neither entitlements nor vested rights, but were in the nature of personal benefits subject to forfeiture, and could not constitute the res of an express trust allegedly created in favor of a structured investment company that had made a lump-sum payment to the debtor, especially given the statutory prohibition against any assignment of such benefits. [In re Bowden](#), 315 B.R. 903 (Bankr. W.D. Wash. 2004).
- 2 [Ferenc v. Nicholson](#), 20 Vet. App. 58 (2006).
- 3 [Rose v. Rose](#), 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987).

77 Am. Jur. 2d Veterans and Veterans Laws § 38

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws


Karl Oakes, J.D.

IV. Payment of Benefits

§ 38. Payment of accrued benefits upon death of beneficiary

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  104.1

Except as provided by law,¹ periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (referred to as "accrued benefits") and due and unpaid, must, upon the death of such individual be paid as specified by statute.²

Entitlement to accrued benefits must be determined based on evidence that was either physically or constructively in the veteran's file at the time of his or her death.³

Observation:

Under the provision providing for the payment of accrued benefits upon the death of a veteran, the substance of a survivor's claim is purely derivative from any benefit to which the veteran might have been entitled at his or her death.⁴ The survivor cannot receive any such attributed benefit that the veteran could not have received upon proper application therefor.⁵ What the law has given to the survivor is, basically, the right to stand in the shoes of the veteran and pursue his or her claim after his or her death.⁶

A check received by a payee in payment of accrued benefits must, if the payee died on or after the last day of the period covered by the check, be returned to the issuing office and canceled, unless negotiated by the payee or the duly appointed representative of the payee's estate.⁷

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- 1 [38 U.S.C.A. § 5121\(a\)](#), referring to [31 U.S.C.A. §§ 3329, 3330](#).
- 2 [38 U.S.C.A. § 5121\(a\)](#).
Funds totaling \$109,464, which were electronically transferred to a veteran's bank account after his death, to account for a retroactive increase in disability-compensation benefits and special monthly compensation (SMC), were "accrued benefits" within the meaning of the statute defining such benefits as "periodic monetary benefits to which an individual was entitled at death" and which were "due and unpaid" at time of death since the benefits in question were periodic payments which were due and unpaid at the time of the veteran's death. [Wilkes v. Principi](#), 16 Vet. App. 237 (2002).
- 3 [Ralston v. West](#), 13 Vet. App. 108 (1999).
A veteran's widow was not entitled to the incremental benefits which allegedly accrued and were due and unpaid to the veteran, as a married man, when he died, inasmuch as the veteran did not have a favorable decision or claim pending at the time of death for such benefits; the statute providing for the payment of accrued benefits "based on evidence in the file at date of death" was limited by a general statute mandating that a claim must be filed for any type of benefit to accrue or be paid. [Jones v. West](#), 136 F.3d 1296 (Fed. Cir. 1998).
- 4 [Zevalkink v. Brown](#), 6 Vet. App. 483 (1994), *aff'd*, 102 F.3d 1236 (Fed. Cir. 1996).
- 5 [Zevalkink v. Brown](#), 6 Vet. App. 483 (1994), *aff'd*, 102 F.3d 1236 (Fed. Cir. 1996).
- 6 [Zevalkink v. Brown](#), 6 Vet. App. 483 (1994), *aff'd*, 102 F.3d 1236 (Fed. Cir. 1996).
- 7 [38 U.S.C.A. § 5122](#).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 39

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws


Karl Oakes, J.D.

IV. Payment of Benefits

§ 39. Recovery of overpayments or debts owed due to participation in benefits program

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  126, 127

West's Key Number Digest, [United States](#)  96

Treatises and Practice Aids

Federal Procedure, L. Ed., Veterans and Veterans Affairs (Collection of debts arising from participation in benefits program)[[Westlaw®\(r\): Search Query](#)]

There may be no recovery of payments or overpayments (or any interest thereon) of any benefits under any of the laws administered by the Secretary of Veterans Affairs whenever the Secretary determines that recovery would be against equity and good conscience, if an application for relief is made within 180 days from the date of notification of the indebtedness by the Secretary to the payee, or within such longer period as the Secretary determines is reasonable in a case in which the payee demonstrates to the satisfaction of the Secretary that such notification was not actually received by such payee within a reasonable period after such date.¹ The Secretary must include in the notification to the payee a statement of the right of the payee to submit an application for a waiver and a description of the procedures for submitting the application.² A notice letter containing a preliminary determination as to the amount of the debt triggers the 180-day period in which a veteran could file a request for a waiver of overpayment.³

An assertion of the nonreceipt of a notice of overpayment of death benefits is not sufficient to overcome the presumption of regularity that the Department of Veterans Affairs properly mailed such notice in the regular course of business.⁴ Also, there is no requirement that the mental illness of a recipient must be considered as a factor in determining when notice was "actually received" pursuant to the statute governing the timeliness of a request for waiver of an overpayment.⁵

The issue of waiver of overpayment, if timely raised, must be addressed as a condition precedent to the recoupment of a debt by the Department of Veterans Affairs.⁶ The Department of Veterans Affairs fails to comply with the statute governing the recovery of overpayments when it begins recovery of a debt from a veteran's compensation payments without ever having considered the veteran's timely application for a partial waiver of overpayment.⁷

However, the recovery of any payment or the collection of any indebtedness (or any interest thereon) may not be waived if, in the Secretary's opinion, there exists in connection with the claim for such waiver an indication of fraud, misrepresentation, or bad faith on the part of the person or persons having an interest in obtaining a waiver of such recovery or the collection of such indebtedness (or any interest thereon).⁸

Provision is specifically made by statute with regard to interest and administrative cost charges to be assessed on delinquent payments of certain amounts due the United States as the result of participation in benefits programs administered by the Secretary of Veterans Affairs,⁹ as well as with regard to the manner of exercising the right of the United States to bring suit in any court of competent jurisdiction to recover any indebtedness owed to the United States by a person by virtue of such person's participation in a benefits program administered by the Secretary.¹⁰

If the Secretary of Veterans Affairs determines that termination of collection is in the best interest of the United States, the Secretary may not collect all or any part of an amount owed to the United States, under any program under the laws administered by the Secretary other than a program carried out under the federal statutes governing pay and allowances of the uniformed services, when such amount is owed by a member of the Armed Forces or veteran who dies as a result of an injury incurred or aggravated in the line of duty while serving in a theater of combat operations in a war or in combat against a hostile force during a period of hostilities after September 11, 2001.¹¹

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Footnotes

- 1 [38 U.S.C.A. § 5302\(a\).](#)
- 2 [38 U.S.C.A. § 5302\(a\)](#), referring to waiver as provided for in [38 U.S.C.A. § 5302\(b\)](#).
No certifying or disbursing officer will be liable for any amount paid to any person where the recovery of such amount is waived. [38 U.S.C.A. § 5302\(d\)](#), referring to [38 U.S.C.A. § 5302\(a\), \(b\)](#).
The statute requiring the Secretary of the Department of Veterans Affairs (VA) to waive payment of an indebtedness to the VA following default and loss of the property, when the Secretary determines that collection of such indebtedness would be against equity and good conscience, was not a money-mandating source sufficient to confer jurisdiction on the Court of Federal Claims under the Tucker Act, in a veteran's action asserting an implied right to a return of the profit from the sale of a home he had purchased with a loan guaranteed by the VA following foreclosure of the loan by the lender, purchase of the home by the VA at a foreclosure sale, and resale of the home at a profit by the VA, where the statute applied only to veterans who were indebted to the VA, and veteran was not required to repay the guaranty. [Anderson v. U.S.](#), 85 Fed. Cl. 532 (2009).
- 3 [Narron v. West](#), 13 Vet. App. 223 (1999).
- 4 [McCullough v. Principi](#), 15 Vet. App. 272 (2001).
- 5 [Barger v. Principi](#), 16 Vet. App. 132 (2002) (death pension benefits).
- 6 [Narron v. West](#), 13 Vet. App. 223 (1999).
- 7 [Narron v. West](#), 13 Vet. App. 223 (1999).
- 8 [38 U.S.C.A. § 5302\(c\)](#).
- 9 [38 U.S.C.A. § 5315](#).
- 10 [38 U.S.C.A. § 5316](#).

11

38 U.S.C.A. § 5302A.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 40

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

IV. Payment of Benefits

§ 40. Criminal liability for fraudulent acceptance of payments

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [126](#), [127](#)

Any person entitled to monetary benefits under any of the laws administered by the Secretary of Veterans Affairs whose right to payment of such benefits ceases upon the happening of any contingency, who thereafter fraudulently accepts any such payment,¹ and anyone who obtains or receives any money or check under any of the laws administered by the Secretary without being entitled to it, and with the intent to defraud the United States or any beneficiary of the United States² is subject to fine or imprisonment or both as specified by statute.

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¹ [38 U.S.C.A. § 6102\(a\).](#)

² [38 U.S.C.A. § 6102\(b\).](#)

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws V A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  107

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77 Am. Jur. 2d Veterans and Veterans Laws § 41

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


V. Minors, Incompetents, and Other Wards

A. In General

§ 41. Costs of commitment proceedings; disposition of certain funds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

The Secretary of Veterans Affairs is empowered to incur necessary court costs and other expenses incident to proceedings for the commitment of mentally incompetent veterans to a Department of Veterans Affairs hospital or domiciliary when necessary for treatment or domiciliary purposes.¹

Provision is also made by federal statute as to the disposition of cash balances in the personal funds of patients and the funds due incompetent beneficiaries' trust funds administered by the Secretary of Veterans Affairs, and moneys received which are properly for deposit into these funds.²

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¹ 38 U.S.C.A. § 5501.

² 38 U.S.C.A. § 5504.

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77 Am. Jur. 2d Veterans and Veterans Laws § 42

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

A. In General

§ 42. Payments to, and supervision of, fiduciaries

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Treatises and Practice Aids

Proceedings pertaining to fiduciaries. Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

Where it appears to the Secretary of Veterans Affairs that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by the Secretary may be made directly to the beneficiary or to a relative or some other fiduciary for the use and benefit of the beneficiary regardless of any legal disability on the part of the beneficiary.¹ Where, in the opinion of the Secretary, any fiduciary receiving funds on behalf of a Department of Veterans Affairs beneficiary is acting in such a number of cases as to make it impracticable to conserve properly the estates or to supervise the persons of the beneficiaries, the Secretary may refuse to make future payments in such cases as the Secretary may deem proper.² Provision is also made by statute with regard to commissions for fiduciaries.³

Whenever it appears that any fiduciary, in the opinion of the Secretary, is not properly executing or has not properly executed the duties of the trust of such fiduciary or has collected or paid, or is attempting to collect or pay, fees, commissions, or allowances that are inequitable or in excess of those allowed by law for the duties performed or expenses incurred, or has failed to make such payments as may be necessary for the benefit of the ward or the dependents of the ward, then the Secretary may appear, by the Secretary's authorized attorney, in the court which has appointed such fiduciary, or in any court having original, concurrent, or appellate jurisdiction over said cause, and make proper presentation of such matters.⁴ The Secretary, in the Secretary's discretion, may suspend payments to any such fiduciary who will neglect or refuse, after reasonable notice, to render an account to the

Secretary from time to time showing the application of such payments for the benefit of such incompetent or minor beneficiary or who neglects or refuses to administer the estate according to law.⁵ The Secretary may require the fiduciary, as part of such account, to disclose any additional financial information concerning the beneficiary (except for information that is not available to the fiduciary).⁶ The Secretary may appear or intervene by the Secretary's duly authorized attorney in any court as an interested party in any litigation, instituted by the Secretary or otherwise, directly affecting money paid to such fiduciary.⁷ The disposition of benefits, the payment of which is suspended or withheld in this manner, is governed by statute.⁸

Any funds in the hands of a fiduciary appointed by a state court or the Secretary derived from benefits payable under laws administered by the Secretary, which under the law of the state wherein the beneficiary had last legal residence would escheat to the state, will escheat to the United States and must be returned by such fiduciary, or by the personal representative of the deceased beneficiary, less legal expenses of any administration necessary to determine that an escheat is in order, to the Department, and must be deposited to the credit of the applicable revolving fund, trust fund, or appropriation.⁹

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Footnotes

- 1 38 U.S.C.A. § 5502(a)(1).
The Department of Veterans Affairs had the authority to select a nursing home administrator as the authorized payee for an incapacitated veteran's benefits even though a state court had appointed another as the guardian and conservator of the veteran's estate. *In re Guardianship and Conservatorship of Blunt*, 358 F. Supp. 2d 882 (D.N.D. 2005).
- 2 38 U.S.C.A. § 5502(a)(1).
- 3 38 U.S.C.A. § 5502(a)(2).
- 4 38 U.S.C.A. § 5502(b).
- 5 38 U.S.C.A. § 5502(b).
- 6 38 U.S.C.A. § 5502(b).
- 7 38 U.S.C.A. § 5502(b).
Authority is granted by statutes for the payment of any court or other expenses incident to any investigation or court proceeding for the appointment of any fiduciary or other person for the purpose of payment of benefits payable under laws administered by the Secretary or the removal of such fiduciary and appointment of another, and of expenses in connection with the administration of such benefits by such fiduciaries, or in connection with any other court proceeding hereby authorized, when such payment is authorized by the Secretary. 38 U.S.C.A. § 5502(c).
- 8 38 U.S.C.A. § 5502(d).
- 9 38 U.S.C.A. § 5502(e).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 43

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


V. Minors, Incompetents, and Other Wards

A. In General

§ 43. Misappropriation by fiduciaries

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Whoever, being a fiduciary for the benefit of a minor, incompetent, or other beneficiary under laws administered by the Secretary of Veterans Affairs, lends, borrows, pledges, hypothecates, uses, or exchanges for other funds or property, except as authorized by law, or embezzles or in any manner misappropriates any such money or property derived therefrom in whole or in part and coming into such fiduciary's control in any manner whatever in the execution of such fiduciary's trust, or under color of such fiduciary's office or service as such fiduciary, must be fined, or imprisoned, or both.¹

Practice Tip:

Any willful neglect or refusal to make and file proper accountings or reports concerning such money or property as required by law will be taken to be sufficient evidence prima facie of embezzlement or misappropriation.²

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Footnotes

¹ [38 U.S.C.A. § 6101\(a\)](#), referring to [38 U.S.C.A. § 5506](#) (definition of "fiduciary").

2 38 U.S.C.A. § 6101(b).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 44

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

A. In General

§ 44. Veterans receiving hospital, institutional, nursing home, or domiciliary care

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Where any veteran having neither spouse nor child is being furnished domiciliary care by the Department of Veterans Affairs, no pension in excess of a specified amount per month will be paid to or for the veteran for any period after the end of the third full calendar month following the month of admission for such care.¹ In the case of a veteran being furnished nursing-home care by the Department and with respect to whom a reduction in pension is required, such reduction may not be made for a period of up to three additional calendar months after the last day of the third month following the month of admission, if the Secretary of Veterans Affairs determines that the primary purpose for the furnishing of such care during such additional period is for the Department to provide such veteran with a prescribed program of rehabilitation services, designed to restore such veteran's ability to function within such veteran's family and community.² If the Secretary determines that it is necessary, after such period, for the veteran to continue such program of rehabilitation services in order to achieve the purposes of such program and that the primary purpose of furnishing nursing-home care to the veteran continues to be the provision of such program to the veteran, the reduction in pension required by law may not be made for the number of calendar months that the Secretary determines is necessary for the veteran to achieve the purposes of such program.³

Additionally, except as provided by law, where any veteran having neither spouse nor child is being furnished nursing-home care by the Department, no pension in excess of a specified amount per month will be paid to or for the veteran for any period after the end of the third full calendar month following the month of admission for such care; any amount in excess of a specified amount per month to which the veteran would be entitled but for the application of the preceding sentence must be deposited in a revolving fund at the Department medical facility which furnished the veteran nursing care, and such amount must be available for obligation without fiscal year limitation to help defray operating expenses of that facility.⁴

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Footnotes

- 1 38 U.S.C.A. § 5503(a)(1).
- 2 38 U.S.C.A. § 5503(a)(1)(D), referring to 38 U.S.C.A. § 5503(a)(1)(B).
- 3 38 U.S.C.A. § 5503(a)(1)(D), referring to 38 U.S.C.A. § 5503(a)(1)(B).
- 4 38 U.S.C.A. § 5503(a)(1)(B), referring to 38 U.S.C.A. § 5503(a)(1)(D).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws V B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  107

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77 Am. Jur. 2d Veterans and Veterans Laws § 45

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

§ 45. Uniform Veterans Guardianship Act, generally; purpose and construction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

A.L.R. Library

[Validity, Construction, and Application of Uniform Veterans Guardianship Act](#), 113 A.L.R.5th 283

Forms

Forms relating to guardians for veterans, generally: see Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws
[\[Westlaw®\(r\) Search Query\]](#)

The intent and purpose of a state legislature in enacting the Uniform Veterans Guardianship Act has been said to be to provide a practical, speedy, and economical procedure for the appointment of curators and the administration of estates of incompetent veterans and their dependents when such estates consist entirely of money received or to be received through the Veterans Administration, of assets acquired with such funds, or of revenues or profits from any property wholly or partially acquired with such funds.¹

While the Uniform Veterans Guardianship Act refers to the "Administrator" and the "Veterans Administration" throughout its provisions, the definitions of these terms in the Act define such terms as including successors to the Veterans Administration and the Administrator.² The designations currently applicable, under federal statute, are the "Department of Veterans Affairs" and the "Secretary of Veterans Affairs."³

A guardianship under the Uniform Veterans Guardianship Act is of limited effect and relates primarily to the receipt of veterans' benefits.⁴

Observation:

The Act is to be so construed as to make uniform the law of those states which enact it.⁵

The Administrator must be a party in interest in any proceeding for the appointment or removal of a guardian or for the removal of the disability of minority or mental incapacity of a ward, and in any suit or other proceeding affecting in any manner the administration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the Veterans Administration.⁶

The Act expressly provides that the laws relating to trial by jury are applicable to beneficiaries and their estates except where they are inconsistent with the Act.⁷

Practice Tip:

The Act prescribes the procedure for committing an incompetent ward to the Department of Veterans Affairs.⁸

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Footnotes

- 1 [Curatorship of Parks, 210 La. 63, 26 So. 2d 289, 173 A.L.R. 1056 \(1946\).](#)
- 2 [Unif. Veterans' Guardianship Act § 1.](#)
- 3 [§ 1.](#)
- 4 [In re Estate of Runyon, 2014 COA 181, 343 P.3d 1072 \(Colo. App. 2014\).](#)
- 5 [Unif. Veterans' Guardianship Act § 19.](#)

6	Unif. Veterans' Guardianship Act § 2.
7	Unif. Veterans' Guardianship Act § 22.
8	Unif. Veterans' Guardianship Act § 18.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 46

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

§ 46. Notice requirements; copies to be given to Secretary of Veterans Affairs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Not fewer than a certain number of days prior to a hearing concerning a ward, notice in writing of the time and place thereof must be given by mail (unless waived in writing) to the office of the Veterans Administration having jurisdiction over the area in which any such suit or any such proceeding is pending.¹ Upon the filing of a petition for the appointment of a guardian, notice must be given to the ward, to such other persons and in such manner as is provided by the general law of the state, and also to the Veterans Administration as provided by the Uniform Veterans Guardianship Act.² At the time of filing in the court any account, a certified copy thereof, and a signed duplicate of each certificate filed with the court must be sent by the guardian to the office of the Veterans Administration having jurisdiction over the area in which the court is located; a signed duplicate or a certified copy of any petition, motion, or other pleading, pertaining to an account, or to any matter other than an account, and which is filed in the guardianship proceedings or in any proceeding for the purpose of removing the disability of minority or mental incapacity, must be furnished by the person filing the same to the proper office of the Veterans Administration.³

The failure to give the Veterans Administration notice of a hearing on, and a copy of, the application may render an order entered in the proceeding a nullity, except, perhaps, where the Administration is in fact represented at the hearing.⁴

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Footnotes

- ¹ Unif. Veterans' Guardianship Act § 2.
- ² Unif. Veterans' Guardianship Act § 8.
- ³ Unif. Veterans' Guardianship Act § 10(3).
- ⁴ [Harrison v. Tonge](#), 67 Ga. App. 54, 19 S.E.2d 535 (1942).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 47

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

§ 47. Appointment of guardian

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Forms

Forms relating to guardians for veterans, generally: see Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws
[\[Westlaw®\(r\) Search Query\]](#)

Whenever, pursuant to any law of the United States or regulation of the Veterans Administration, it is necessary, prior to payment of benefits, that a guardian be appointed, the appointment may be made in the manner provided by the Uniform Veterans Guardianship Act.¹ A petition for the appointment of a guardian may be filed by any relative or friend of the ward or by any person who is authorized by law to file such a petition.² If there is no person so authorized or if the person so authorized refuses or fails to file such a petition within 30 days after mailing of notice by the Veterans Administration to the last known address of the person, if any, indicating the necessity for the same, a petition for appointment may be filed by any resident of the state.³

Notwithstanding any law as to priority of persons entitled to appointment, or the nomination in the petition, the court may appoint some other individual, or a bank or trust company, as guardian, if the court determines it is for the best interest of the ward.⁴ Thus, the Act does not preclude a court from considering the order of priority set forth in the general conservatorship or guardianship statute when deciding whom to appoint as a guardian.⁵

In the case of a mentally incompetent ward, the petition must show that such ward has been rated incompetent by the Veterans Administration on examination in accordance with the laws and regulations governing the Veterans Administration.⁶ Where a petition is filed for the appointment of a guardian for a minor, or for an incompetent person, as provided for by the Act, a certificate of the Secretary of Veterans Affairs or his or her authorized representative containing the specified information is prima facie evidence of the necessity for such appointment although such evidence may be rebutted.⁷

No person other than a bank or trust company may be guardian of more than five wards at one time unless all the wards are members of one family.⁸

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Footnotes

- | | |
|---|----------------------------------------------------------------------------------------|
| 1 | Unif. Veterans' Guardianship Act § 3. |
| 2 | Unif. Veterans' Guardianship Act § 5(1). |
| 3 | Unif. Veterans' Guardianship Act § 5(1). |
| 4 | Unif. Veterans' Guardianship Act § 5(3). |
| 5 | In re Estate of Runyon, 2014 COA 181, 343 P.3d 1072 (Colo. App. 2014). |
| 6 | Unif. Veterans' Guardianship Act § 5(4). |
| 7 | Application of Altieri, 187 Misc. 958, 65 N.Y.S.2d 655 (Sup 1946). |
| 8 | Unif. Veterans' Guardianship Act § 4. |

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 48

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

§ 48. Appointment of guardian—Effect of appointment, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Forms

Forms relating to guardians for veterans, generally: see Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws
[\[Westlaw®\(r\) Search Query\]](#)

The effect of the appointment of a guardian under the Uniform Veterans Guardianship Act is very limited as compared with the effect of an appointment under the general laws.¹ The view has been taken that an appointment of a guardian under the Act does not affect the legal capacity of the ward with respect to various matters other than the administration of property received from the United States under veterans' legislation.²

However, there is also authority for the view that the appointment of a guardian is prima facie evidence of the incompetency of the ward but that such prima facie case may be rebutted by evidence which shows that the ward was competent to understandingly manage his or her business affairs and to enter into contracts at the time of making the alleged contracts in question.³ Thus, where there is a question of fact presented for the determination of the trial court of whether the ward was competent at the time of the making of an alleged contract, summary judgment is not authorized.⁴ However, this does not mean that the guardian does not have full control and management, subject to court supervision, of the ward's property, which has been placed in its custody, management, and control.⁵

Practice Tip:

If an adjudication of insanity is made in a court of competent jurisdiction, under the Act, but by reason of some fatally defective procedural steps such proceeding is wholly invalid, then the mere fact of the purported record adjudication would be sufficient to place any person having knowledge thereof on notice that inquiry as to actual insanity should be made.⁶

The fact that a veteran has been adjudged incompetent under the Act and a guardian was appointed for his or her estate many years prior to his or her marriage and prior to his or her divorce action may not preclude a court from granting the veteran a divorce where there is no evidence in the record that the veteran was ever under guardianship as to his or her person and there is no evidence indicating a present or recent need for a personal guardian.⁷

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Footnotes

- 1 [In re Vaell's Estate](#), 158 Cal. App. 2d 204, 322 P.2d 579 (2d Dist. 1958), stating that the Act was never intended as a substitute for the provisions of the State Probate Code relating to the appointment of guardians for minors or for insane or incompetent persons.
- 2 [In re Vaell's Estate](#), 158 Cal. App. 2d 204, 322 P.2d 579 (2d Dist. 1958).
- 3 [Home Town Finance Corp. v. Frank](#), 13 Utah 2d 26, 368 P.2d 72 (1962).
- 4 [Home Town Finance Corp. v. Frank](#), 13 Utah 2d 26, 368 P.2d 72 (1962).
- 5 [Home Town Finance Corp. v. Frank](#), 13 Utah 2d 26, 368 P.2d 72 (1962).
- 6 [Rymer v. Smith](#), 38 Tenn. App. 414, 274 S.W.2d 643 (1954).
- 7 [Lovett v. Lovett](#), 254 Ark. 349, 493 S.W.2d 435 (1973), judgment *aff'd*, 256 Ark. 734, 510 S.W.2d 569 (1974).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 49

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

§ 49. Ward's attainment of majority or recovery of competency; removal and discharge of guardian

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Forms

Forms relating to guardians for veterans, generally: see Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws [\[Westlaw®\(r\) Search Query\]](#)

In addition to any other provisions of law relating to judicial restoration and discharge of a guardian, a certificate by the Veterans Administration showing that a minor ward has attained majority, or that an incompetent ward has been rated competent by the Veterans Administration upon examination in accordance with law, will be prima facie evidence that the ward has attained majority or has recovered his or her competency.¹ Upon hearing after notice as provided by the Uniform Veterans Guardianship Act, and the determination by the court that the ward has attained majority or has recovered his or her competency, an order must be entered to that effect, and the guardian must file a final account.² Upon hearing after notice to the former ward and to the Veterans Administration as in case of other accounts, upon approval of the final account, and upon delivery to the ward of the assets due him or her from the guardian, the guardian must be discharged and his or her sureties released.³

The fact that a committee has not been discharged, or the fact that a veteran has not been adjudged sane following the adjudication of sanity by the Department, is not sufficient to show that the veteran was insane at any time after having been adjudicated sane by the Department.⁴

If any guardian fails to file with the court any account as required by the Act, or by an order of the court, when any account is due or within 30 days after citation issues as provided by law, or fails to furnish the Veterans Administration a true copy of any account, petition, or pleading as required by the Act, such failure may in the discretion of the court be ground for his or her removal.⁵

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Footnotes

- | | |
|---|-------------------------------------------------------------------------------------|
| 1 | Unif. Veterans' Guardianship Act § 17. |
| 2 | Unif. Veterans' Guardianship Act § 17. |
| 3 | Unif. Veterans' Guardianship Act § 17. |
| 4 | Palmer v. Lititz Mut. Ins. Co. , 113 F. Supp. 857 (W.D. S.C. 1953). |
| 5 | Unif. Veterans' Guardianship Act § 11. |

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 50

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

§ 50. Guardian's bond

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Forms

Forms relating to guardians for veterans, generally: see Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws
[\[Westlaw®\(r\) Search Query\]](#)

Upon the appointment of a guardian, he or she must execute and file a bond to be approved by the court in an amount not less than the estimated value of the personal estate and anticipated income of the ward during the ensuing year.¹ The phrase "personal estate and anticipated income" is not limited to moneys received by the guardian from the Veterans Administration, and earnings, interest, and profits derived therefrom.² In addition, the court may, from time to time, require the guardian to file an additional bond.³ Where a bond is tendered by a guardian with personal sureties, there must be at least two such sureties and they must file with the court a certificate under oath which must describe the property owned, both real and personal, and must state that each is worth the sum named in the bond as the penalty thereof over and above all his or her debts and liabilities and the aggregate of other bonds on which he or she is principal or surety and exclusive of property exempt from execution.⁴ The court may require additional security or may require a corporate surety bond, the premium thereon to be paid from the ward's estate.⁵

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Footnotes

- 1 Unif. Veterans' Guardianship Act § 9(1).
- 2 [Rymer v. Smith, 38 Tenn. App. 414, 274 S.W.2d 643 \(1954\).](#)
- 3 Unif. Veterans' Guardianship Act § 9(1).
- 4 Unif. Veterans' Guardianship Act § 9(2).
- 5 Unif. Veterans' Guardianship Act § 9(2).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 51

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

V. Minors, Incompetents, and Other Wards

B. Uniform Veterans Guardianship Act

§ 51. Guardian's rights in property not derived from Department of Veterans Affairs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  107

Forms

Forms relating to guardians for veterans, generally: see Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws [\[Westlaw®\(r\) Search Query\]](#)

The Uniform Veterans Guardianship Act deals only with property derived from the Veterans Administration and the income of property acquired in whole or in part with such property.¹ Indeed, the Act defines "income" as moneys received from the Department of Veterans Affairs and revenue or profit from any property wholly or partially acquired therewith, and "estate" means income on hand and assets acquired partially or wholly with "income," and while the provisions of the Act concerning the disposition of the "income" and the "estate" of the ward seem broad enough to include all income or estate, these provisions must be limited by these definitions.²

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Footnotes

¹ [In re Vaell's Estate](#), 158 Cal. App. 2d 204, 322 P.2d 579 (2d Dist. 1958); [Curatorship of Parks](#), 210 La. 63, 26 So. 2d 289, 173 A.L.R. 1056 (1946).

Under the Florida version of the Act, a guardian appointed under such provisions is responsible only for moneys received from the Veterans Administration and all earnings, interest, and profits derived therefrom;

thus, the trial court erred in refusing to approve or ratify the use by the guardian—the veteran's ex-wife—of the veteran's Social Security benefits, since the ex-wife's duties as guardian did not extend to those funds. [In re Benner's Guardianship](#), 427 So. 2d 1086 (Fla. 1st DCA 1983).

The Act applies only to moneys received from the Veterans Administration or property, or income from property, acquired with such benefits received from the Veterans Administration, and does not apply where there is no evidence that an incompetent has any such money or property. [DeWald v. Morris](#), 397 S.W.2d 738 (Mo. Ct. App. 1965).

2 [In re Vaell's Estate](#), 158 Cal. App. 2d 204, 322 P.2d 579 (2d Dist. 1958), referring to definitions in Unif. Veterans' Guardianship Act § 1.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws VII Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VII. Disposition of Personal Property of Veterans and Patients at Veterans Care Facilities; Personal Property Lost or Left at Facilities

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest


West's Key Number Digest, [Armed Services](#)  101, 101.1

West's Key Number Digest, Escheat  2 to 4, 6 to 8(1)

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  101, 101.1

West's A.L.R. Digest, Escheat  2 to 4, 6 to 8(1)

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77 Am. Jur. 2d Veterans and Veterans Laws § 81

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VII. Disposition of Personal Property of Veterans and Patients at Veterans Care Facilities; Personal Property Lost or Left at Facilities

§ 81. Disposition of property of facility patients dying while receiving care from Department of Veterans Affairs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101, 101.1

West's Key Number Digest, Escheat  2 to 4, 6 to 8(1)

A.L.R. Library

[Federal Statute As to Disposition of Personal Property of Veteran Dying in Veterans Administration Facility Without Spouse or Heirs \(38 U.S.C.A. secs. 8520 to 8528 and Predecessors\), 191 A.L.R. Fed. 573](#)

Whenever any veteran (admitted as a veteran), or a dependent or survivor of a veteran receiving care under a specified statute, dies while a member or patient in any facility, or in any hospital while being furnished care or treatment therein by the Department of Veterans Affairs, and does not leave any surviving spouse, next of kin, or heirs entitled, under the laws of the decedent's domicile, to the decedent's personal property as to which such person dies intestate, all such property, including money and choses in action, owned by such person at the time of death and not disposed of by will or otherwise will immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund, a trust fund prescribed by law.¹

Practice Tip:

The fact of death of a veteran (admitted as such), or of a dependent or survivor of a veteran receiving care under statute,² in a facility or hospital, while being furnished care or treatment therein by the Department, leaving no spouse, next of kin, or heirs, must give rise to a conclusive presumption of a valid contract for the disposition in accordance with law, but subject to its conditions, of all property described by law owned by said decedent at death and as to which such person dies intestate.³

The State is not an "heir" of a veteran who dies intestate⁴ even though a state intestacy statute provides that if there are no heirs of specified classes, the intestate's property shall descend to the State.⁵

The federal statute providing for the vesting of property of a veteran who dies while a member or patient in a facility while being furnished care by the Department of Veterans Affairs applies where a veteran receives institutional treatment or care furnished by the Department either in one of its own facilities or in some other facility, such as a private nursing home, that is adapted to meet the veteran's particular needs.⁶ Moreover, the statute is operative even in the absence of a contract between the veteran and the United States, and hence applicable to a veteran who was mentally incompetent when entering the hospital and who remained incompetent until his or her death.⁷

Federal statutes govern the sale of any assets accruing to the benefit of the Fund other than money, including jewelry and other personal effects, at the times and places and in the manner prescribed by regulations issued by the Secretary, and govern also as to the disposition of proceeds from such sale.⁸ Provision is also made by statute as to disbursements from the General Post Fund,⁹ and the disposal of the remainder of assets or their proceeds.¹⁰

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Footnotes

- 1 38 U.S.C.A. § 8520(a), referring to 31 U.S.C.A. § 1321(a)(45) and 38 U.S.C.A. § 1781(b) (medical care for survivors and dependents of certain veterans).
As to hospitals, nursing homes and domiciliary care, generally, see §§ 52 to 57.
Provision is also made by statute with regard to investment of the Fund. 38 U.S.C.A. § 8528.
- 2 38 U.S.C.A. § 8521, referring to 38 U.S.C.A. § 1781(b).
- 3 38 U.S.C.A. § 8521, referring to property described in 38 U.S.C.A. § 8520.
A contract by a veteran for the vesting in the United States of his or her personal property upon his death intestate in a Department of Veterans Affairs hospital without spouse, next of kin, or heir, in consideration of the care received at the hospital, is not invalid as a testamentary disposition without compliance with the statutory requirements as to wills. *In re Witte's Estate*, 174 Kan. 360, 255 P.2d 1039, 36 A.L.R.2d 717 (1953).
- 4 *In re Skriziszouski's Estate*, 382 Pa. 634, 116 A.2d 841 (1955).
- 5 *Coakley v. Attorney General*, 318 Mass. 508, 62 N.E.2d 659 (1945); *In re McGhee's Estate*, 149 Misc. 713, 268 N.Y.S. 79 (Sur. Ct. 1932) (noting that the federal law is paramount); *In re Gonsky's Estate*, 79 N.D. 123, 55 N.W.2d 60 (1952); *In re Skriziszouski's Estate*, 382 Pa. 634, 116 A.2d 841 (1955).
The net proceeds of the estate of a veteran who died intestate while confined to a Veterans Administration Hospital, leaving no known heirs or distributees, passed to the Treasurer of the United States under the federal statute and did not escheat to the State under the applicable state statute. *Matter of Kenny's Estate*, 107 Misc. 2d 1026, 436 N.Y.S.2d 589 (Sur. Ct. 1981).
- 6 *In re Wallace's Estate*, 186 Neb. 271, 182 N.W.2d 829 (1971) (where the facility was paid for its services by the Veterans Administration).

As to care provided in facilities of, or by providers other than the Department of Veterans Affairs, see §§ 58 to 63.

7 U.S. v. Oregon, 366 U.S. 643, 81 S. Ct. 1278, 6 L. Ed. 2d 575 (1961).

As to incompetent veterans, generally, see §§ 41 to 44.

8 38 U.S.C.A. § 8522.

9 38 U.S.C.A. § 8523.

10 38 U.S.C.A. § 8524.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 82

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VII. Disposition of Personal Property of Veterans and Patients at Veterans Care Facilities; Personal Property Lost or Left at Facilities

§ 82. Disposition of property of facility patients dying while receiving care from Department of Veterans Affairs—Actions and claims as to decedent's assets

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101, 101.1

West's Key Number Digest, Escheat  8(2)

If necessary to obtain the assets of a veteran or patient who has died while in a facility while receiving care from the Department of Veterans Affairs, the Secretary of Veterans Affairs, through his or her authorized attorneys, may bring and prosecute appropriate actions at law or other legal proceedings, the costs and expenses of which are to be paid as are other administrative expenses of the Department.¹ Furthermore, a procedure is set forth by statute for the claiming of the decedent's assets by persons claiming a right to them.² Under this provision, any person claiming a right to such assets may, within five years after the death of the decedent, file a claim on behalf of the person and any others claiming with the Secretary.³

In the event of doubt as to entitlement, the Secretary may cause administration or other appropriate proceedings to be instituted in any court having jurisdiction.⁴ In determining questions of fact or law involved in the adjudication of claims made, no judgment, decree, or order entered in any action at law, suit in equity, or other legal proceeding of any character purporting to determine entitlement to the assets or any part of them will be binding upon the United States or the Secretary or determinative of any fact or question involving entitlement to any such property or the proceeds thereof, or to any part of the Fund, unless the Secretary has been seasonably served with notice and permitted to become a party to such suit or proceeding if the Secretary makes a request therefor within 30 days after such notice.⁵

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Footnotes

¹ [38 U.S.C.A. § 8525.](#)

² [38 U.S.C.A. § 8526.](#)

3 38 U.S.C.A. § 8526.
4 38 U.S.C.A. § 8526.
5 38 U.S.C.A. § 8526.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 83

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VII. Disposition of Personal Property of Veterans and Patients at Veterans Care Facilities; Personal Property Lost or Left at Facilities

§ 83. Property left by decedent at Department of Veterans Affairs facility

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101, 101.1

West's Key Number Digest, [Escheat](#)  2 to 4, 6, 7

Personal property left by any decedent upon premises used as a Department of Veterans Affairs facility, which premises are subject to the exclusive legislative jurisdiction of the United States and are within the exterior boundaries of any state or dependency of the United States, will generally vest and be disposed of as provided in the applicable provisions.¹ However, if the person died leaving a last will and testament probated under the laws of the place of such person's domicile or under the laws of the state or dependency of the United States within the exterior boundaries of which such premises or a part thereof may be, the personal property of the decedent situated upon the premises will vest in the person or persons entitled to them under the provisions of the decedent's last will and testament.² Furthermore, if the person died leaving any property not disposed of by a last will and testament, the property will vest in the persons entitled to take such property by inheritance under and upon the conditions provided by the law of the decedent's domicile.³

The United States has ceded to the respective state or dependency such jurisdiction pertaining to the administration of estates of decedents as may have been ceded to the United States by the state or dependency respecting the federal reservation on which is situated any Department facility while such facility is operated by the Department,⁴ and to the extent necessary to effectuate the purposes of applicable statutes, the statute has relinquished to the respective state or dependency of such jurisdiction with respect to any such property on any such reservation to be to the same extent as if such premises had not been ceded to the United States.⁵

All persons having or bringing personal property on the premises of a Department of Veterans Affairs facility must be given reasonable notice of the provisions of the statutes pertaining to the disposition of personal property left by a decedent on premises at a Department of Veterans Affairs facility.⁶

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Footnotes

- 1 [38 U.S.C.A. § 8501\(a\)](#).
The term "facility" or "Department facility" means those facilities over which the Department has direct and exclusive administrative jurisdiction, including hospitals or other facilities on property owned or leased by the United States while operated by the Department. [38 U.S.C.A. § 8509](#).
- 2 [38 U.S.C.A. § 8501\(a\)\(1\)](#).
- 3 [38 U.S.C.A. § 8501\(a\)\(2\)](#), also providing that this provision does not apply to property to which the United States is entitled except where such title is divested out of the United States.
- 4 [38 U.S.C.A. § 8508](#).
- 5 [38 U.S.C.A. § 8508](#).
- 6 [38 U.S.C.A. § 8503](#).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 84

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VII. Disposition of Personal Property of Veterans and Patients at Veterans Care Facilities; Personal Property Lost or Left at Facilities

§ 84. Property left by decedent at Department of Veterans Affairs facility— Disposition of unclaimed personal property of decedent; sale and notice thereof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101, 101.1

West's Key Number Digest, Escheat  8

If any veteran (admitted as a veteran), or a dependent or survivor of a veteran receiving care under statute, upon such person's last admission to, or during such person's last period of maintenance in, a Department of Veterans Affairs facility, has personal property situated on such facility and has designated in writing a person (natural or corporate) to receive such property when such veteran, dependent, or survivor dies, the Secretary of Veterans Affairs or employee of the Department authorized by the Secretary so to act may transfer possession of such personal property to the person so designated.¹ If there exists no person so designated by such veteran, dependent, or survivor or if the one so designated declines to receive such property or has failed to request such property within 90 days after the Department mails to such designate a notice of death and of the fact of such designation, a description of the property, and an estimate of transportation cost, which must be paid by such designate if required under the regulations, or if the Secretary declines to transfer possession to such designate, possession of such property may, in the discretion of the Secretary or the Secretary's designated subordinate, be transferred to the following persons in the order and manner specified unless the parties otherwise agree in writing delivered to the Department, namely, executor or administrator, or if no notice of appointment received, to the spouse, children, grandchildren, parents, grandparents, siblings of the veteran.² If claim is made by two or more such relatives having equal priorities, or if there are conflicting claims, the Secretary or the Secretary's designee may in such case deliver the property either jointly or separately in equal values to those equally entitled thereto, may make delivery as may be agreed upon by those entitled, or may in the discretion of the Secretary or the Secretary's designee withhold delivery from them and require the qualification of an administrator or executor of the veterans' estate and thereupon make delivery to such.³

If the property of any decedent is not so delivered or claimed and accepted, the Secretary or the Secretary's designee may dispose of such property by public or private sale in accordance with the provisions of law and regulations prescribed by the Secretary.⁴

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- 1 [38 U.S.C.A. § 8502\(b\)](#), referring to [38 U.S.C.A. § 1781\(b\)](#) (medical care for survivors and dependents of certain veterans).
- 2 [38 U.S.C.A. § 8502\(b\)](#).
- 3 [38 U.S.C.A. § 8502\(b\)](#).
- 4 [38 U.S.C.A. § 8502\(c\)](#).
As to notice of sale, see [38 U.S.C.A. § 8506](#).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 85

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VII. Disposition of Personal Property of Veterans and Patients at Veterans Care Facilities; Personal Property Lost or Left at Facilities

§ 85. Personal property of veterans dying while patients in state facilities

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  101, 101.1

West's Key Number Digest, [Escheat](#)  2 to 4, 6 to 8

Under statutes in some states, a state veterans' home, in the absence of certain favored heirs, becomes the statutory heir to all moneys and other personal property of a veteran who became a member of the home prior to a specified date.¹ Furthermore, state statutes have sometimes, with regard to veterans who became members of a state home before a specified date, prevented the testamentary disposition by such veteran to any except certain favored near relatives, if he or she was a member of the state home at the time of his or her death.² Such statutory provisions have been construed together as voiding a veteran's will, which purported to leave all his moneys and personal property to nonrelatives and to substitute the state home as his statutory heir.³

State statutes restricting the right of a veteran to dispose of his or her property by will only to his or her spouse, parents, children, or grandchildren in the event of his or her death while a member of a veterans' home for the aged and disabled, and providing that if a veteran dies intestate while a member, with none of the specified persons surviving him or her, his or her property passes to the veterans' home, do not violate the equal-protection provisions of the Fourteenth Amendment of the Federal Constitution, where the classification, distinguishing between veterans who die while members of the veterans' home and those who do not, is deemed to bear a rational relationship to a legitimate state purpose in that the veterans' home was maintained for aged and disabled veterans unable to pay for necessary hospital and domiciliary care, and the statutes accommodated the legitimate public purpose in managing the homes at a cost no greater than is consistent with the welfare and proper care of its members.⁴

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- ¹ [Mautner v. Peralta](#), 215 Cal. App. 3d 796, 263 Cal. Rptr. 535 (1st Dist. 1989), where the statute provided that all moneys and other personal property of any veteran other than that described in another statute relating to property held by the Home or left on the premises, would, upon the death of the veteran, in the absence

of a spouse, children, grandchildren, or father or mother, pass and descend to, and become the property of, the home for the credit to the Post Fund.

2 [Mautner v. Peralta, 215 Cal. App. 3d 796, 263 Cal. Rptr. 535 \(1st Dist. 1989\).](#)

3 [Mautner v. Peralta, 215 Cal. App. 3d 796, 263 Cal. Rptr. 535 \(1st Dist. 1989\)](#), also noting that under a state statute, if the total value of the veteran's property in the state (above certain amounts not germane to the appeal) did not exceed \$3,000, the state home could proceed to collect money due the decedent without procuring letters of administration or probating the will, by presenting the holder of the funds with an affidavit showing the state home's right to receive the money.

4 [Estate of Murphy, 37 Cal. App. 3d 411, 112 Cal. Rptr. 317 \(1st Dist. 1974\)](#), also rejecting arguments that applicable state constitutional provisions were violated by the statute.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws VIII A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 121

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  113.1 to 121

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End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 86

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

A. In General

§ 86. Purpose, effect, and application of federal statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 121

Federal statutes, collectively referred to as the Uniformed Services Employment and Reemployment Rights Act (USERRA),¹ specifically make provision regarding the employment and reemployment rights of veterans.² The purposes of these provisions are to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;³ minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities by providing for the prompt reemployment of such persons upon their completion of such service;⁴ and to prohibit discrimination against persons because of their service in the uniformed services.⁵

Observation:

Statutes protecting members of the Armed Forces reserves from discrimination in hiring and employment necessarily mandate a related obligation on employers not to hinder present employees from joining the reserves.⁶

The federal statutes generally pertaining to employment and reemployment of veterans⁷ do not supersede, nullify, or diminish any federal or state law, including any local law or ordinance, contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in the federal statutes⁸ but do supersede any state law, including any local law or ordinance, contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by the federal statutes, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.⁹ Moreover, USERRA preempts arbitration agreements purportedly covering claims arising under the Act.¹⁰

The federal statutes relating to veterans' employment and reemployment¹¹ apply to the legislative branch of the federal government.¹²

Observation:

Statutes detail certain requirements of the Secretary of Labor with regard to the prescription of regulations to implement the statutes regarding employment and reemployment rights of members of the uniformed services and veterans,¹³ an annual report regarding such provisions which must be made to Congress,¹⁴ and, along with the Secretary of Defense and the Secretary of Veterans Affairs, the taking of such actions as the Secretaries determine are appropriate to inform persons entitled to rights and benefits under the applicable statutes¹⁵ and employers of the rights, benefits, and obligations of such persons and such employers under such provisions.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Airline pilot, in putative class action against his employer and its wholly owned subsidiary, stated a claim that defendants violated Uniformed Services Employment and Reemployment Rights Act (USERRA) via policy of not paying employees out on short-term military leave while paying employees for comparable forms of short-term leave, such as for jury duty, sick leave, and union leave; USERRA was required to be construed liberally in favor of airline pilot as a service member, USERRA clearly mandated that employees on military leave be treated equally with other employees with respect to terms, conditions, and privileges of employment, and equal treatment existed only if employees on short-term military leave had same rights and benefits as other employees in comparable situations. 38 U.S.C.A. §§ 4301, 4303, 4316(b)(1). [Scanlan v. American Airlines Group, Inc.](#), 384 F. Supp. 3d 520 (E.D. Pa. 2019).

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Footnotes

1 [Gummo v. Village of Depew, N.Y.](#), 75 F.3d 98 (2d Cir. 1996).

2 38 U.S.C.A. §§ 4301 to 4335.

3 38 U.S.C.A. § 4301(a)(1).

4 38 U.S.C.A. § 4301(a)(2).

5 38 U.S.C.A. § 4301(a)(3).

As to specific statutory provisions regarding discrimination against veterans in employment, see § 88.

6 *Fox v. Baltimore City Police Dept.*, 201 F.3d 526, 45 Fed. R. Serv. 3d 828 (4th Cir. 2000).

7 38 U.S.C.A. §§ 4301 to 4335.

8 38 U.S.C.A. § 4302(a).

9 38 U.S.C.A. § 4302(b).

10 *Breletic v. CACI, Inc.—Federal*, 413 F. Supp. 2d 1329 (N.D. Ga. 2006).

11 38 U.S.C.A. §§ 4301 to 4335.

12 2 U.S.C.A. § 1302(a)(11).

13 38 U.S.C.A. § 4331.

Regulations regarding restoration to duty from the uniformed service or a compensable injury are contained in 5 C.F.R. §§ 353.101 to 353.304.

14 38 U.S.C.A. § 4332.

15 38 U.S.C.A. §§ 4301 to 4335.

16 38 U.S.C.A. § 4333.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 87

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

A. In General

§ 87. Character of discharge or dropping from Armed Forces rolls for certain reasons as affecting statutory rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [113.1](#), [114\(1\)](#), [120](#)

Entitlement to the benefits under the provisions for employment and reemployment by reason of the service of such person in one of the uniformed services¹ terminates upon a separation of the person from such uniformed service with a dishonorable or bad conduct discharge,² even if the employee has prior honorable discharges,³ or upon a separation of the person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.⁴ Similarly, entitlement to these benefits ends upon a dismissal of the person permitted under a provision regarding the dismissal of commissioned officers of the Armed Forces⁵ or a dropping of such person from the rolls of any Armed Forces for reasons specified by statute.⁶

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Footnotes

¹ 38 U.S.C.A. §§ 4301 to 4335.

² 38 U.S.C.A. § 4304(1).

³ *Tootle v. Merit Systems Protection Bd.*, 559 Fed. Appx. 998 (Fed. Cir. 2014).

⁴ 38 U.S.C.A. § 4304(2).

⁵ 38 U.S.C.A. § 4304(3) (referring to 10 U.S.C.A. § 1161(a)).

As to separations from military service of officers, generally, see Am. Jur. 2d, Military and Civil Defense[[Westlaw®\(r\): Search Query](#)].

⁶ 38 U.S.C.A. § 4304(4) (referring to 10 U.S.C.A. § 1161(b), discussed, generally in Am. Jur. 2d, Military and Civil Defense[[Westlaw®\(r\): Search Query](#)]).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 88

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

A. In General

§ 88. Discrimination against veterans

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1, 114(1), 116

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), one who has performed service in a uniformed service may not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that performance of service.¹ This antidiscrimination provision protects active duty service members as well as reservists and members of the National Guard.² An employer will be considered to have engaged in such prohibited action if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.³ Discriminatory motivation because of military status may be inferred from a variety of factors in a USERRA case, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.⁴ If a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is the proximate cause of the ultimate employment action, then the employer is liable under USERRA, notwithstanding that that supervisor did not make the ultimate employment decision.⁵ Inasmuch as a "benefit of employment"⁶ includes the "terms, conditions, or privileges of employment,"⁷ the protection afforded by USERRA extends to ensuring that employees are not subjected to hostile work environments.⁸

An employer also may not discriminate in employment or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under the statutory provisions pertaining to employment and reemployment rights of members of the uniformed service,⁹ has testified or otherwise made a statement in, or in connection

with, any proceeding under such provisions;¹⁰ has assisted or otherwise participated in an investigation under such provisions;¹¹ or has exercised a right provided for in such provisions.¹² An employer is considered to have engaged in these prohibited actions where the person's:¹³

- (1) action to enforce a protection afforded any person under the statutes governing employment and reemployment rights of members of the uniformed services;¹⁴
- (2) testimony or making of a statement in, or in connection with, any proceeding under such provisions;
- (3) assistance or other participation in an investigation under the provisions; or
- (4) exercise of a right provided for in the provisions is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

An employee undertakes an "action to enforce a protection afforded any person," required for a retaliation claim under USERRA when he or she makes internal complaints of activity he or she perceives as USERRA discrimination.¹⁵

These prohibitions¹⁶ apply to any position of employment,¹⁷ including the reemployment of persons who have left positions to serve in the uniformed services for a brief, nonrecurrent period, where there is no reasonable expectation that such employment would continue indefinitely or for a significant period.¹⁸

It is unlawful for an employing office of the federal government, as defined by statute,¹⁹ to discriminate, within the meaning of these statutory provisions, against an eligible employee.²⁰

CUMULATIVE SUPPLEMENT

Cases:

At bench trial, district court's factual finding that employer's owner willfully violated Uniformed Services Employment and Reemployment Rights Act (USERRA), such that employee was entitled to liquidated damages, when he failed to reemploy employee when she returned from three weeks of mandatory military training with National Guard was not clearly erroneous; owner testified that he knew that members of armed forces enjoyed reemployment rights, and employee testified that she warned employer's general manager that employer was probably violating USERRA. [38 U.S.C.A. § 4301 et seq.](#); [20 C.F.R. § 1002.312\(c\)](#). [Mace v. Willis](#), 897 F.3d 926 (8th Cir. 2018).

Veteran's allegations that he would have been selected to fill U.S. Housing and Urban Development (HUD) vacancies if competitive hiring process had been fairly administered in accordance with the law and that the fact that he appealed his prior non-selections to the Department of Labor (DOL) and Merit Systems Protection Board (MSPB) was a substantial motivating factor in HUD's decision not to select him for later vacancies were insufficient to constitute allegations of discriminatory animus, and thus did not constitute non-frivolous allegations that HUD violated Veterans Employment Opportunity Act (VEOA) or Uniformed Service Employment and Reemployment Act (USERRA) by not selecting veteran for later vacancies. [5 U.S.C.A. § 3302 et seq.](#); [38 U.S.C.A. § 4301 et seq.](#) [Jolley v. Merit Systems Protection Board](#), 752 Fed. Appx. 964 (Fed. Cir. 2018).

Agency's investigation of employee, who had served in Coast Guard and had previously invoked his anti-discrimination rights under Uniformed Services Employment and Reemployment Rights Act (USERRA), did not constitute adverse employment action, and thus could not amount to retaliation under USERRA; agency's investigation, which included placing monitoring device in employee's car, did not result in any firing, demotion, suspension, loss of benefits, or reduction in pay, and investigation

did not relate directly to employee's employment with agency. [38 U.S.C.A. § 4311\(b\)](#). [Kitlinski v. Merit Systems Protection Board](#), 857 F.3d 1374 (Fed. Cir. 2017).

Municipal employee who served in Marine Corps Reserve sufficiently established that he was meeting his employer's legitimate expectations, as required to support Uniformed Services Employment and Reemployment Rights Act (USERRA) retaliation claim; employee had no formal written reprimands prior to a dispute with supervisors over whether he was entitled to take additional time off to attend military training events. [38 U.S.C.A. § 4311\(a\)](#). [Bello v. Village of Skokie](#), 151 F. Supp. 3d 849 (N.D. Ill. 2015).

Coworkers' alleged conduct of intimidation, ridicule, and insult towards employee, who was firefighter and member of New York Air National Guard, was not sufficiently severe or pervasive as to alter conditions of employment, and thus city and members of fire department were not liable for hostile work environment under Uniformed Services Employment and Reemployment Rights Act (USERRA), New York Military Law, or New York State Human Rights Law (NYSHRL); none of the conduct at issue involved physical harassment, alleged statements by colleague, including that employee spent "most of [his] time at Air National Guard doing nothing," were rude but not actionable, employee made no showing that coworkers' refusal to socialize with him was connected to his military service, and isolation was result of disclosure of employee's secret recording of his colleagues. [38 U.S.C.A. § 4311\(a\)](#); [N.Y. Military Law § 242](#); et seq.; [N.Y. Executive Law § 290 et seq.](#) [Kassel v. City of Middletown](#), 272 F. Supp. 3d 516 (S.D. N.Y. 2017).

Employer acted "willfully" within meaning of Uniformed Services Employment and Reemployment Act (USERRA), in refusing reemploy employee upon her return from military service leave, as required for servicemember to recover liquidated damages in amount equal to amount of lost wages or benefits; employer acted in reckless disregard for USERRA's strict liability reemployment provisions when it did not attempt to offer reemployment until three weeks after receiving notice that employee had not only asked for reemployment but that, by denying that reemployment, employee believed that employer was in violation of the law, and when employer did offer reemployment, it was after employee had quit and it needed to hire a replacement for her. [38 U.S.C.A. §§ 4312, 4323\(a\)\(3\)](#); [20 C.F.R. § 1002.312](#). [Mace v. Willis](#), 259 F. Supp. 3d 1007 (D.S.D. 2017).

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Footnotes

- 1 [38 U.S.C.A. § 4311\(a\)](#).
[38 C.F.R. §§ 18.411 to 18.414](#) provides regulations regarding employment practices in connection with the nondiscrimination in federally assisted programs of the Department of Veterans Affairs.
A city's offering to police officers alternative foreign testing sites while on military duty in Iraq and El Salvador, for taking examinations to qualify for promotions to police sergeant, did not deny a benefit of employment to persons in the armed services, as prohibited discrimination under USERRA, since the city treated officers on military duty the same as other employees by offering an opportunity to take the test on the same terms as other employees outside the city but not in military service, and the Act did not require accommodation of the officers' claim for preferential treatment compared to other employees. [Sandoval v. City of Chicago, Illinois](#), 560 F.3d 703 (7th Cir. 2009).
As to discrimination in employment, generally, see Am. Jur. 2d, Job Discrimination[[Westlaw®\(r\): Search Query](#)].
- 2 [McLain v. City of Somerville](#), 424 F. Supp. 2d 329, 64 Fed. R. Serv. 3d 703 (D. Mass. 2006).
- 3 [38 U.S.C.A. § 4311\(c\)\(1\)](#).
In a USERRA action, the employee's four successive months of negative commissions was a legitimate, nondiscriminatory reason for the employer's transfer of the employee from the position of sales representative to that of trainer. [Maxfield v. Cintas Corp.](#), No. 2, 563 F.3d 691 (8th Cir. 2009).

The Department of the Air Force's inability to complete the optional procedure of an in-person desk audit while a member of the Air Force Reserve was on military leave could not form a legally cognizable basis to discriminate against the member because of his military service, and thus, military leave was a motivating factor for the adverse employment action of failure to process a position upgrade request and promote the member in the member's action alleging discrimination based on military leave. [Hayden v. Department of Air Force](#), 812 F.3d 1351 (Fed. Cir. 2016).

[Rivera-Cartagena v. Wal-Mart Puerto Rico, Inc.](#), 767 F. Supp. 2d 310 (D.P.R. 2011).

[Staub v. Proctor Hosp.](#), 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011).

38 U.S.C.A. § 4311(a).

38 U.S.C.A. § 4303(2).

[Montoya v. Orange County Sheriff's Dept.](#), 987 F. Supp. 2d 981 (C.D. Cal. 2013).

38 U.S.C.A. § 4311(b)(1) (referring to provisions of 38 U.S.C.A. §§ 4301 to 4335).

38 U.S.C.A. § 4311(b)(2).

38 U.S.C.A. § 4311(b)(3).

38 U.S.C.A. § 4311(b)(4).

38 U.S.C.A. § 4311(c)(2).

38 U.S.C.A. §§ 4301 to 4335.

[Gagnon v. Sprint Corp.](#), 284 F.3d 839 (8th Cir. 2002).

38 U.S.C.A. § 4311(a), (b).

38 U.S.C.A. § 4311(d).

38 U.S.C.A. § 4311(d) (referring to employment described in 38 U.S.C.A. § 4312(d)(1)(C)).

2 U.S.C.A. §§ 1301(9), 1316(a)(2)(C).

2 U.S.C.A. § 1316(a)(1)(A).

"Eligible employee," for this purpose, is defined in 2 U.S.C.A. § 1316(a)(2)(A).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws VIII B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

B. Reemployment Rights

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 116, 118, 120

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  113.1 to 116, 118, 120

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77 Am. Jur. 2d Veterans and Veterans Laws § 89

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

B. Reemployment Rights

§ 89. Reemployment rights, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 116

A.L.R. Library

[When does sale or reorganization exempt business from re-employment requirements of military veterans' re-employment laws \(38 U.S.C.A. secs. 2021 et seq.\), 63 A.L.R. Fed. 132](#)

Treatises and Practice Aids

Reemployment rights, Federal Procedure, L. Ed., Veteran and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

Forms

Forms relating to re-employment rights, generally, see Federal Procedural Forms, Veterans and Veterans Laws; Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws [\[Westlaw®\(r\) Search Query\]](#)

Subject to certain statutory provisions,¹ under the Uniformed Services Employment and Reemployment Rights Act (USERRA),² any person who is absent from a position of employment by reason of service in the uniformed services will be entitled to the reemployment rights and benefits and other employment benefits of the applicable statutory provisions.³ To be eligible: (1) the person, or an appropriate officer of the uniformed service in which such service is performed, must have given advance written or verbal notice of such service to such person's employer;⁴ (2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services must not exceed five years;⁵ and (3) with specified exception,⁶ the person must report to, or submit an application for reemployment to, such employer in accordance with the applicable statutory provisions prescribing requirements as to notification to the employer.⁷ State statutes also sometimes provide for the reemployment of state residents who have voluntarily or upon demand vacated a position of employment to enter upon active duty or training in the Armed Forces of the United States provided they have met certain statutory requirements.⁸

Under the federal statutory provisions, an employer is not required to reemploy a veteran if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable.⁹ The changed circumstances exemption is an affirmative defense, and the employer bears the burden of proving that it had a change in circumstances and that reemployment was impossible or unreasonable.¹⁰ State statutes also, similarly, have provided that an employer need not reemploy a veteran if circumstances have so changed as to make it impossible, unreasonable, or against the public interest for the employer to do so.¹¹ In addition, under the federal provisions, an employer is not required to reemploy a veteran entitled to reemployment under certain provisions, including provisions pertaining to certain disabled veterans,¹² if such employment would impose an undue hardship on the employer¹³ or if the employment from which the person left to serve in the uniformed services was for a brief, nonrecurrent period, and there was no reasonable expectation that such employment would continue indefinitely or for a significant period.¹⁴ Likewise, under some state provisions, the requirement of reemployment does not apply to temporary positions.¹⁵

Caution:

The above USERRA requirements apply only to the initial rehiring, not subsequent reassignments.¹⁶

A returning veteran's former position is not unavailable simply because it is occupied by another; the returning veteran is not to be denied his or her rightful position because an employer will be forced to displace another employee.¹⁷ Even so, the right of a person to reemployment under the applicable federal statute¹⁸ does not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the title of the federal statutes as to federal employees,

relating to veterans and other preference eligibles.¹⁹ It is unlawful for an employing office, as defined by statute,²⁰ of the federal government to deny to an eligible employee²¹ reemployment rights within the meaning of the applicable statutory provision pertaining generally to the reemployment rights of a veteran.²²

Federal statutes also set forth the requirements for veterans' reemployment by the federal government²³ and by certain federal agencies.²⁴

Protection under the Veterans Reemployment Rights Act is based upon a veteran's compliance with the reasonable and ordinarily accepted standards of personal conduct and performance of duty of all employees.²⁵

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Footnotes

- 1 38 U.S.C.A. §§ 4304, 4312(b), (c), (d).
- 2 38 U.S.C.A. § 4312.
- 3 38 U.S.C.A. §§ 4301 to 4335.
- 4 38 U.S.C.A. § 4312(a)(1).
- 5 38 U.S.C.A. § 4312(a)(2).
- 6 38 U.S.C.A. § 4312(f).
- 7 38 U.S.C.A. § 4312(a)(3) (referring to provisions of 38 U.S.C.A. § 4312(e)).
- 8 *Nichols v. Snohomish County*, 109 Wash. 2d 613, 746 P.2d 1208 (1987).
- 9 38 U.S.C.A. § 4312(d)(1)(A).
- 10 *Davis v. Crothall Services Group, Inc.*, 961 F. Supp. 2d 716 (W.D. Pa. 2013).
- 11 *Nichols v. Snohomish County*, 109 Wash. 2d 613, 746 P.2d 1208 (1987).
- 12 38 U.S.C.A. § 4313(a)(3), (a)(4), (b)(2)(B).
- 13 38 U.S.C.A. § 4312(d)(1)(B).
- 14 38 U.S.C.A. § 4312(d)(1)(C).
- 15 *Nichols v. Snohomish County*, 109 Wash. 2d 613, 746 P.2d 1208 (1987).
- 16 *Bennett v. Dallas Independent School Dist.*, 936 F. Supp. 2d 767, 297 Ed. Law Rep. 208 (N.D. Tex. 2013).
- 17 *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993).
- 18 38 U.S.C.A. § 4312.
- 19 38 U.S.C.A. § 4312(g).
As to veterans' and others' preferences for employment in the federal civil service, generally, see Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 20 2 U.S.C.A. §§ 1301(9), 1316(a)(2)(C).
- 21 "Eligible employee" for this purpose is defined in 2 U.S.C.A. § 1316(a)(2)(A).
- 22 2 U.S.C.A. § 1316(a)(1)(B).
- 23 38 U.S.C.A. § 4314.
- 24 38 U.S.C.A. § 4315.
- 25 *Preda v. Nissho Iwai American Corp.*, 128 F.3d 789 (2d Cir. 1997).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 90

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

B. Reemployment Rights

§ 90. Reemployment position; priorities as between individuals seeking reemployment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [115](#), [116](#), [118\(4\)](#)

Specific provision is made by the Uniformed Services Employment and Reemployment Rights Act (USERRA) with regard to the position as to which a veteran must be reemployed.¹ With statutorily specified exceptions,² a person whose period of service in the uniformed services was for more than 90 days is entitled to reemployment in a position in the following order of priority: in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform,³ or in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform but only if the person is not qualified to perform the duties of a position in which he or she was previously employed after reasonable efforts by the employer to qualify the person.⁴ Provision is specifically made with regard to the reemployment position required regarding a person who has a disability incurred in, or aggravated during, his or her service and who, after reasonable efforts by the employer to accommodate the disability, is not qualified due to such disability to be employed in the position of employment in which he or she would have been employed if the continuous employment had not been interrupted by such service.⁵

Observation:

USERRA is not a veteran's preference statute, and it was not intended to give returning service members special benefits not provided to other employees; thus, an employee may be delivered into layoff status under the Act if the employee's seniority or

job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment.⁶

Statutes govern the priority where two or more persons are entitled to reemployment in the same position of employment and more than one of them has reported for such reemployment.⁷

State statutes may also grant rights of veterans to be reemployed in their prior position or a similar position. For example, a state statute has provided that a public employee who leaves a position, whether voluntarily or involuntarily, to perform military duty is separated or discharged under honorable conditions, makes application for reemployment within 90 days after he or she is relieved from military duty, and is still physically qualified to perform the duties of such position must be restored to such position if it exists and is not held by a person with greater seniority or to a position of like seniority, status, and pay.⁸ Based on the definition of "military duty" as including training and service performed by a reservist, such statute requires reemployment of a public employee within 90 days after being released from reserve duty, not just after release from active duty.⁹

Caution:

The above requirements apply only to the initial rehiring, not subsequent reassignments.¹⁰

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Footnotes

1 38 U.S.C.A. § 4313.

2 38 U.S.C.A. § 4313(a)(3), (a)(4).

3 38 U.S.C.A. § 4313(a)(2)(A).

As general rule, an employee is entitled under USERRA to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service; this position is referred to as the "escalator position." *Hanson v. County of Kitsap*, 21 F. Supp. 3d 1124 (W.D. Wash. 2014). An employer complied with the USERRA provision requiring reinstatement of an employee in the position she would have been in had she not taken military leave or a position of like seniority, status, and pay by reinstating the employee to the same employee grade, in the same unit, and at a rate of pay that reflected two raises instituted during her absence, notwithstanding that the employer initially considered reassigning the employee to another position. *Clegg v. Arkansas Dept. of Correction*, 496 F.3d 922 (8th Cir. 2007).

4 38 U.S.C.A. § 4313(a)(2)(B).

5 38 U.S.C.A. § 4313(a)(3).

6 *Vahey v. General Motors Company*, 985 F. Supp. 2d 51 (D.D.C. 2013).

7 38 U.S.C.A. § 4313(b).

8 *State ex rel. Mileff v. Mifflin Twp.*, 65 Ohio St. 3d 400, 1992-Ohio-38, 604 N.E.2d 740 (1992).

- 9 [State ex rel. Mileff v. Mifflin Twp.](#), 65 Ohio St. 3d 400, 1992-Ohio-38, 604 N.E.2d 740 (1992).
- 10 [Bennett v. Dallas Independent School Dist.](#), 936 F. Supp. 2d 767, 297 Ed. Law Rep. 208 (N.D. Tex. 2013).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 91

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

B. Reemployment Rights

§ 91. Benefits related to reemployment position

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [113.1](#), [118\(3\)](#), [118\(6\)](#)

A.L.R. Library

[Applicability to fringe benefits of Vietnam Era Veterans Readjustment Assistance Act provision establishing veterans' reemployment rights \(38 U.S.C.A. sec. 2021\), 83 A.L.R. Fed. 908](#)

A person who is reemployed under the federal statutory provisions pertaining to employment and reemployment of veterans¹ is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services, plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.²

Observation:

A federal employee who did not request a leave of absence before leaving his civilian employment with the National Guard for military service in the Active Guard Reserve (AGR) did not have reemployment rights under the Vietnam Era Veterans Readjustment Assistance Act (VRRRA) following his AGR service, and absent such rights, he was not entitled to credit his AGR service toward a Civil Service Retirement System annuity.³

Pension benefits are considered a perquisite of seniority protected by the Veterans Reemployment Rights Act.⁴ Subject to certain statutory provisions,⁵ a person who is absent from a position of employment by reason of service in the uniformed services will be deemed to be on furlough or leave of absence while performing such service⁶ and entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.⁷ A "leave of absence," for these purposes, is not any leave of absence but rather one comparable to the leave provided to the service member for military service.⁸

Provision is also specifically made by statute with regard to health plans of persons who have been absent from their employment due to service in the Armed Forces,⁹ as well as with regard to employee pension benefit plans of such persons.¹⁰

In connection with the question of a veteran's seniority rights, when a collective-bargaining agreement conflicts with a statute pertaining to veterans' rights of reemployment, the provisions of the statute must prevail since to hold otherwise would allow companies and unions to bargain away, without the veterans' consent, rights explicitly secured to the veterans by Congress.¹¹

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Footnotes

- 1 38 U.S.C.A. §§ 4301 to 4335.
- 2 38 U.S.C.A. § 4316(a).
- 3 *Kiszka v. Office of Personnel Management*, 372 F.3d 1301 (Fed. Cir. 2004).
- 4 *Lapine v. Town of Wellesley*, 304 F.3d 90 (1st Cir. 2002), referring to 38 U.S.C.A. §§ 4301 to 4334.
- 5 38 U.S.C.A. § 4316(b)(2) to (6).
- 6 38 U.S.C.A. § 4316(b)(1)(A).
- 7 38 U.S.C.A. § 4316(b)(1)(B).
- 8 *Tully v. Department of Justice*, 481 F.3d 1367 (Fed. Cir. 2007).
- 9 38 U.S.C.A. § 4317.
- 10 38 U.S.C.A. § 4318.
A county that employed a veteran violated the statute governing pension plans for returning veterans as the veteran's rate of pay varied such that it was not reasonably certain as required by law. *Hanson v. County of Kitsap*, 21 F. Supp. 3d 1124 (W.D. Wash. 2014).
- 11 *Hembree v. Georgia Power Co.*, 637 F.2d 423 (5th Cir. 1981).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 92

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

B. Reemployment Rights

§ 92. Discharge from employment of reemployed veterans

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  120

A.L.R. Library

[What is "cause" justifying discharge from employment of returning serviceman re-employed under sec. 9 of the Military Selective Service Act of 1967 \(50 USC Appendix sec. 459\), 9 A.L.R. Fed. 225](#)

A person who is reemployed by an employer under the statutory provisions for employment or reemployment of veterans¹ may not be discharged from such employment except for cause within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days,² or within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.³ It has been said that in this context, the term "cause" must be construed and applied narrowly.⁴ There is also authority that conduct-based cause for an employment action is not limited to employee misconduct, the standard being one of reasonableness.⁵

Caution:

Despite the protections afforded by the above provisions, an employer is still allowed to terminate a rehired employee as part of a reduction in force.⁶

CUMULATIVE SUPPLEMENT

Cases:

Employee's termination was not motivated by antimilitary animus, in action for wrongful discharge in violation of Uniformed Services Employment and Reemployment Rights Act (USERRA), where employer's intraoffice emails did not rise to level of expressed hostility, three-month gap between employee's return from medical leave and employer's investigation of alleged misconduct was not sufficient to support inference of discrimination based on temporal proximity, employee experienced no negative treatment from employer during those three months, and employee's placement on administrative leave occurred immediately after employee grabbed other employee by shoulders, pushed him, and yelled at him to not touch equipment in operating room. [38 U.S.C.A. § 4316\(c\)](#). [Murray v. Mayo Clinic](#), 784 Fed. Appx. 995 (9th Cir. 2019).

Employee's military service was substantial or motivating factor in Social Security Administration's (SSA) termination of his employment, as element of discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA), where SSA rushed to terminate employee before he obtained Civil Service Reform Act (CSRA) benefits intertwined with his prior military service; employee was fired four days before he would have obtained CSRA benefits, upon his completion of one-year probationary employment period applicable to preference-eligible veterans, as opposed to two-year period for non-veterans. [5 U.S.C.A. §§ 7511\(a\)\(1\)\(B\), 7511\(a\)\(1\)\(C\)](#); [38 U.S.C.A. § 4311\(c\)\(1\)](#). [McGuffin v. Social Security Administration](#), 942 F.3d 1099 (Fed. Cir. 2019).

Allegation by probationary police officer, who was member of United States Army Reserve, that District of Columbia did not reemploy him in good faith did not state claim for failure to reemploy under Uniformed Services Employment and Reemployment Rights Act (USERRA); officer did not contend that he returned to work in position other than one he held when he departed for leave, and officer alleged that he returned to work, met with his supervisor, was informed he was suspended for two days, and was terminated five days after he returned to work. [38 U.S.C.A. § 4312](#). [Jbari v. District of Columbia](#), 304 F. Supp. 3d 201 (D.D.C. 2018).

Employee's unprofessional behavior in engaging in heated verbal altercations with two coworkers constituted nondiscriminatory grounds for termination, and thus employer was not liable for wrongful termination under the Uniformed Services Employment and Reemployment Rights Act (USERRA); employer relied on investigation by conducted by outside, unbiased compliance personnel who reviewed employee's performance reviews and numerous statements of coworkers in determining that employee had history of yelling, arguing, and behaving in an unprofessional manner with coworkers. [38 U.S.C.A. § 4311](#). [Hickle v. American Multi-Cinema, Inc.](#), 296 F. Supp. 3d 879 (S.D. Ohio 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [38 U.S.C.A. §§ 4301 to 4335](#).
- 2 [38 U.S.C.A. § 4316\(c\)\(1\)](#).

- 3 38 U.S.C.A. § 4316(c)(2).
4 Duarte v. Agilent Technologies, Inc., 366 F. Supp. 2d 1039 (D. Colo. 2005).
5 Rademacher v. HBE Corp., 645 F.3d 1005 (8th Cir. 2011).
6 Milhauser v. Minco Products, Inc., 855 F. Supp. 2d 885 (D. Minn. 2012), *aff'd*, 701 F.3d 268 (8th Cir. 2012).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws VIII C Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#) 🔑 113.1 to 123, 153
West's Key Number Digest, [Public Contracts](#) 🔑 129
West's Key Number Digest, [Public Employment](#) 🔑 99, 431 to 834
West's Key Number Digest, [United States](#) 🔑 1335

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration
West's A.L.R. Digest, [Armed Services](#) 🔑 113.1 to 123, 153
West's A.L.R. Digest, [Public Contracts](#) 🔑 129
West's A.L.R. Digest, [Public Employment](#) 🔑 99, 431 to 834
West's A.L.R. Digest, [United States](#) 🔑 1335

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77 Am. Jur. 2d Veterans and Veterans Laws § 93

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General


1. State and Local Offices and Employment

§ 93. Veterans' preferences, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 118

West's Key Number Digest, [Public Employment](#)  99

Forms

Forms relating to re-employment rights, generally, see Federal Procedural Forms, Veterans and Veterans Laws; Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws [[Westlaw®\(r\) Search Query](#)]

Veterans' preference statutes are designed, at least in part, to reward veterans for their service and sacrifice to the nation.¹ State statutes sometimes provide that the State, state bodies, or local subdivisions of the State give preferences in appointment and employment to veterans honorably discharged from the Armed Forces.² Rights in employment as to certain state or local positions may not be protected under particular veterans' preference statutes.³

Caution:

Veterans' preferences in county employment created by state law are not essential attributes of national citizenship and thus do not merit protection under the Fourteenth Amendment Privileges and Immunities Clause.⁴

Veterans' preference statutes may also authorize that preferences be given to spouses,⁵ widows of veterans,⁶ or widows or widowed mothers of veterans who were killed in action or died from a service connected disability incurred in wartime service⁷ and that preferences be given in a specified order as, for example, first, to disabled veterans, in the order of their respective standings; second, to veterans, in the order of their respective standings; and third, to widows or widowed mothers of veterans who were killed in action or died from a service connected disability incurred in wartime service, in the order of their respective standings.⁸

Statutes may establish various classes of veterans or spouses of veterans to be given preference in appointment and retention in positions of employment.⁹

Statutes may specifically require that preferences be given to veterans as to provisional original appointments.¹⁰

Procedures by a state department which give veterans a priority in being interviewed do not translate into a preference in appointment for purposes of a state statute requiring that veterans be given preferences in appointment to positions.¹¹

Observation:

Whether a State Veterans Preference Act is applicable is ultimately a question of law on which the state appellate court is free to exercise its independent judgment.¹²

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Footnotes

- 1 [Denton v. Civil Service Com'n of State of Ill.](#), 277 Ill. App. 3d 770, 214 Ill. Dec. 666, 661 N.E.2d 520 (4th Dist. 1996), judgment aff'd, 176 Ill. 2d 144, 223 Ill. Dec. 461, 679 N.E.2d 1234 (1997).
The veterans' preference in some state statutes is a legislatively created mechanism under which veterans receive a preference over nonveterans in certain types of civil service employment. [Aquino v. Civil Service Com'n](#), 34 Mass. App. Ct. 538, 613 N.E.2d 131 (1993).
As to veterans' and others' preferences for employment in the federal civil service, generally, see Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 2 [West Coast Regional Water Supply Authority v. Harris](#), 604 So. 2d 892 (Fla. 1st DCA 1992), cause dismissed, 613 So. 2d 4 (Fla. 1992); [Leelanau County Sheriff v. Kiessel](#), 297 Mich. App. 285, 824 N.W.2d 576 (2012); [Pinther v. State, Dept. of Admin. and Information](#), 866 P.2d 1300 (Wyo. 1994).
- 3 [Ojala v. St. Louis County](#), 522 N.W.2d 342 (Minn. Ct. App. 1994).

- 4 Carrabus v. Schneider, 119 F. Supp. 2d 221 (E.D. N.Y. 2000), judgment aff'd, 13 Fed. Appx. 33 (2d Cir. 2001).
- 5 Harris v. State, Public Employees Relations Com'n, 568 So. 2d 475 (Fla. 1st DCA 1990); Davis v. Vance County Dept. of Social Services, 91 N.C. App. 428, 372 S.E.2d 88 (1988); Pinther v. State, Dept. of Admin. and Information, 866 P.2d 1300 (Wyo. 1994).
- 6 Davis v. Vance County Dept. of Social Services, 91 N.C. App. 428, 372 S.E.2d 88 (1988); Pinther v. State, Dept. of Admin. and Information, 866 P.2d 1300 (Wyo. 1994).
- 7 Aquino v. Civil Service Com'n, 34 Mass. App. Ct. 538, 613 N.E.2d 131 (1993).
- 8 Aquino v. Civil Service Com'n, 34 Mass. App. Ct. 538, 613 N.E.2d 131 (1993).
- 9 Harris v. State, Public Employees Relations Com'n, 568 So. 2d 475 (Fla. 1st DCA 1990).
- 10 Aquino v. Civil Service Com'n, 34 Mass. App. Ct. 538, 613 N.E.2d 131 (1993).
- 11 Denton v. Civil Service Com'n of State of Ill., 277 Ill. App. 3d 770, 214 Ill. Dec. 666, 661 N.E.2d 520 (4th Dist. 1996), judgment aff'd, 176 Ill. 2d 144, 223 Ill. Dec. 461, 679 N.E.2d 1234 (1997).
- 12 Harr v. City of Edina, 541 N.W.2d 603 (Minn. Ct. App. 1996).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 94

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General

1. State and Local Offices and Employment

§ 94. Absolute preferences

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 115

West's Key Number Digest, [Public Employment](#)  99

While some veterans' preference statutes grant other than absolute preferences in employment for veterans,¹ and absolute employment preferences for veterans have been specifically abolished by some state legislatures,² other state statutes give certain veterans an absolute hiring preference.³

An absolute preference for veterans in public employment is constitutionally permissible although such an absolute preference for veterans within a given category rating does not translate to a "guarantee" of state employment.⁴ On the other hand, there is also authority for the view that a statutory absolute promotional preference to veterans is incompatible with state constitutional provisions as "unreasonable" and "class legislation."⁵

A state law granting an absolute lifetime preference to veterans, by requiring that any person, male or female, including a nurse, qualifying for a civil service position, who was honorably discharged from the United States Armed Forces after 90 days of active service, at least one day of which was during wartime must be considered for appointment to a civil service position ahead of any qualifying nonveterans, does not violate the Equal Protection Clause of the Fourteenth Amendment as discriminating on the basis of sex, notwithstanding that the preference operates to the advantage of males, where the distinction drawn by the statute between veterans and nonveterans is not a pretext for gender discrimination, and it is not shown that the law in any way reflects a purpose to discriminate on the basis of sex.⁶

Footnotes

- 1 Harris v. State, Public Employees Relations Com'n, 568 So. 2d 475 (Fla. 1st DCA 1990); McAfee v. Department of Revenue, 514 N.W.2d 301 (Minn. Ct. App. 1994).
- 2 Olson v. State, Dept. of Revenue, 235 Mont. 31, 765 P.2d 171 (1988).
- 3 Harris v. State, Public Employees Relations Com'n, 568 So. 2d 475 (Fla. 1st DCA 1990).
- 4 Denton v. Civil Service Com'n of State of Ill., 277 Ill. App. 3d 770, 214 Ill. Dec. 666, 661 N.E.2d 520 (4th Dist. 1996), judgment *aff'd*, 176 Ill. 2d 144, 223 Ill. Dec. 461, 679 N.E.2d 1234 (1997).
- 5 Markel v. McIndoe, 59 F.3d 463 (3d Cir. 1995).
- 6 Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 95

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General

1. State and Local Offices and Employment

§ 95. Effect of job qualifications

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  115(8)

West's Key Number Digest, [Public Employment](#)  99

A.L.R. Library

[Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes, 58 A.L.R.2d 960](#)

While absolute preferences sometimes are granted to veterans,¹ under some veterans' preference statutes, a veteran is to be preferred for appointment or employment over other applicants of no greater qualifications.² Some provisions establish eligible lists on the basis of category ratings such as "superior," "excellent," "well-qualified," and "qualified" and require that the veteran eligibles in each such category must be preferred for appointment before the nonveteran eligibles in the same category.³ Other statutes specify that qualified war veterans must be given preference in employment if their disability does not prevent satisfactory performance of the work⁴ or that with regard to positions in which the appointment or employment of persons is not subject to a written examination, preference in appointment and employment must be given by the State and its political subdivisions to specified veterans provided such persons possess the minimum qualifications necessary to the discharge of the duties involved.⁵

Under some veterans' preference acts, veterans who seek to take advantage of such provisions must be able to accomplish the "proper performance of public duties," that is, a veteran seeking to take advantage of the preference mandated by the applicable statute must be able to demonstrate his or her ability to perform the job at the level of skill and with the expertise demanded by the employer.⁶

Matters affecting a veteran's qualifications for a civilian job he or she held prior to entering service, which occur prior to his or her application for reemployment, can be the basis for finding the veteran not qualified for reemployment.⁷

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Footnotes

- 1 § 94.
- 2 [Vislisel v. University of Iowa](#), 445 N.W.2d 771, 56 Ed. Law Rep. 304 (Iowa 1989); [Olson v. State, Dept. of Revenue](#), 235 Mont. 31, 765 P.2d 171 (1988).
- 3 [Denton v. Civil Service Com'n of State of Ill.](#), 277 Ill. App. 3d 770, 214 Ill. Dec. 666, 661 N.E.2d 520 (4th Dist. 1996), judgment [aff'd](#), 176 Ill. 2d 144, 223 Ill. Dec. 461, 679 N.E.2d 1234 (1997).
- 4 [James v. Department of Transp. of State of Idaho](#), 125 Idaho 892, 876 P.2d 590 (1994).
To be qualified to return to a prior position, a veteran must be both physically capable of performing the duties of the job and temperamentally able to work harmoniously with coworkers and supervisors. [Lapine v. Town of Wellesley](#), 304 F.3d 90 (1st Cir. 2002).
- 5 [West Coast Regional Water Supply Authority v. Harris](#), 604 So. 2d 892 (Fla. 1st DCA 1992), cause dismissed, 613 So. 2d 4 (Fla. 1992).
- 6 [Brickhouse v. Spring-Ford Area School Dist.](#), 540 Pa. 176, 656 A.2d 483, 99 Ed. Law Rep. 503 (1995).
- 7 [Lapine v. Town of Wellesley](#), 167 F. Supp. 2d 132 (D. Mass. 2001), [aff'd](#), 304 F.3d 90 (1st Cir. 2002).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 96

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General

1. State and Local Offices and Employment

§ 96. Preferences as to promotions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1, 118(4)

West's Key Number Digest, [Public Employment](#)  99

The language of some veterans' preference statutes has been construed as limiting the veterans' preference to original appointments and as not applying to a veterans' preference in promotions.¹ On the other hand, statutes in some states have conferred preferences to veterans seeking promotions to public positions.² In this regard, where a state veterans' preference act explicitly directs that the preference is to be applied in all of the State's political subdivisions, a city civil service regulation, repudiating such preference, is invalid.³ It has been held that applying the veteran's preference statute, with respect to employment in public departments to promotions, as well as to initial hiring, does not create a due process or equal protection violation.⁴ However, a statutory absolute promotional preference to veterans has been held to be unconstitutional in some instances.⁵

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Footnotes

- ¹ [Aquino v. Civil Service Com'n](#), 34 Mass. App. Ct. 538, 613 N.E.2d 131 (1993).
- ² [Carter v. City of Philadelphia](#), 989 F.2d 117 (3d Cir. 1993); [Davis v. Vance County Dept. of Social Services](#), 91 N.C. App. 428, 372 S.E.2d 88 (1988).
Under the Pennsylvania Veterans Preference Act, whenever any soldier possessed the requisite qualifications and was eligible to appointment to, or to promotion in, a public position, where no such civil service examination was required, the appointing power in making a promotion to a public position was required to

give preference to such soldier. [Brickhouse v. Spring-Ford Area School Dist.](#), 540 Pa. 176, 656 A.2d 483, 99 Ed. Law Rep. 503 (1995).

As to veterans' and others' preferences for employment in the federal civil service, generally, see Am. Jur. 2d, Civil Service[[Westlaw®\(r\): Search Query](#)].

3 [Carter v. City of Philadelphia](#), 989 F.2d 117 (3d Cir. 1993).

4 [State ex rel. Slusher v. City of Leavenworth](#), 285 Kan. 438, 172 P.3d 1154 (2007).

5 § 94.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 97

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights


C. Preferential Right to Office or Employment, in General

1. State and Local Offices and Employment

§ 97. Remedies and proceedings to protect or enforce preference; proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122

West's Key Number Digest, [Public Employment](#)  431 to 834

A.L.R. Library

[Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes, 58 A.L.R.2d 960](#)

Forms

Forms relating to re-employment rights, generally, see Federal Procedural Forms, Veterans and Veterans Laws; Am. Jur. Pleading and Practice Forms, Veterans and Veterans Laws [\[Westlaw®\(r\) Search Query\]](#)

Statutes in some states provide for writs of mandate against public officials who willfully fail or refuse to give preference to qualified veterans.¹ The preference conferred under statutes in some states to armed forces veterans seeking civil service promotions has been deemed to be afforded constitutional protection, such preference conferring on veterans a protected property interest.²

At least with regard to appointments not involving absolute preferences to the veteran involved, it has been said that when an employer selects a nonveteran over a person who is eligible for a veteran's preference, the initial burden is on the veteran to show minimal qualifications, a timely and proper application for a covered position, and that the employer selected a nonveteran or a veteran with a lesser preference; the burden then shifts to the employer to show that the nonveteran applicant was more qualified.³ However, under statutes providing that: (1) a job applicant who is a veteran and who claims the right to a preference is entitled to be hired over any other applicant with substantially equal qualifications who is not a preference-eligible applicant; and (2) the term "substantially equal qualifications" is defined as meaning that the qualifications of two or more persons are such that the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons, the court is required to order the public employer to appear in court and show cause why the applicant was not hired for the position upon the filing of a petition by a veteran, and at the hearing, the public employer has the burden of proving by a preponderance of the evidence that the employer made a reasonable determination of "substantial equal qualifications."⁴ Deciding which job candidate is more qualified for a position, for purposes of evaluating a veterans' preference challenge to the hiring of a nonveteran, is a fact question for the hearing officer.⁵

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Footnotes

- 1 [James v. Department of Transp. of State of Idaho, 125 Idaho 892, 876 P.2d 590 \(1994\).](#)
Veterans could enforce their rights regarding public employment under the state veterans' preference act by either petitioning for a writ of mandamus or by requesting an order from the state commissioner of veterans affairs. [Young v. City of Duluth, 386 N.W.2d 732 \(Minn. 1986\).](#)
- 2 [Carter v. City of Philadelphia, 989 F.2d 117 \(3d Cir. 1993\).](#)
- 3 [West Coast Regional Water Supply Authority v. Harris, 604 So. 2d 892 \(Fla. 1st DCA 1992\),](#) cause dismissed, 613 So. 2d 4 (Fla. 1992).
- 4 [Olson v. State, Dept. of Revenue, 235 Mont. 31, 765 P.2d 171 \(1988\).](#)
- 5 [School Dist. Of Collier County v. Fuqua, 136 So. 3d 687, 303 Ed. Law Rep. 1093 \(Fla. 2d DCA 2014\).](#)

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 98

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General


2. Federal Offices and Employment

§ 98. Preference eligibles under federal civil service law

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 114(2), 123

West's Key Number Digest, [United States](#)  1335

For the purposes of certain federal statutes pertaining to federal employees, generally,¹ the "preference eligible" group, as defined by statute,² includes, with specified exceptions,³ a veteran, as specifically defined,⁴ a disabled veteran,⁵ the unmarried widow or widower of a veteran,⁶ the wife or husband of a service connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia,⁷ the mother of an individual who lost his or her life under honorable conditions while serving in the armed forces, under circumstances as specified by statute,⁸ the mother of a service connected permanently and totally disabled veteran, under statutorily specified circumstances,⁹ or a veteran who was discharged or released from a period of active duty by reason of a sole survivorship discharge.¹⁰ The term "preference eligible" does not include applicants for, or members of, the Senior Executive Service, the Defense Intelligence Senior Executive Service, the Senior Cryptologic Executive Service, or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service.¹¹ In addition, it does not include, except for purposes of statutes pertaining to performance appraisals of,¹² or adverse actions against,¹³ federal civil service employees, a retired member of the armed forces unless the individual is a disabled veteran¹⁴ or retired below the rank of major or its equivalent.¹⁵ The term "retired member of the Armed Forces" means a member or former member of the armed forces who is entitled, under statute, to retirement or retainer pay on account of service as a member.¹⁶

Specific provision is made by federal statute with regard to the waiver of requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position, and physical requirements if the preference eligible is physically able to perform efficiently the duties of the position, including the right of a preference eligible who has a compensable

service connected disability of 30% or more who is found not able to fulfill the physical requirements of the position to respond to that finding (as notification requirements of that response right)¹⁷ and the manner of listing preference eligibles in eligibility lists for federal civil service positions.¹⁸ A preference eligible who receives a passing grade in an examination for entrance into the competitive federal civil service is entitled to a specified number of additional points above his or her earned rating.¹⁹

Under such regulations as the Office of Personnel Management must prescribe, an agency may make a noncompetitive appointment leading to conversion to career or career-conditional employment of a disabled veteran who has a compensable service connected disability of 30% or more.²⁰

The fact that an applicant for appointment as a Foreign Service officer candidate is a veteran or disabled veteran must be considered an affirmative factor in making such appointments.²¹

A statute providing that the Secretary of the Army may appoint individuals to civilian intelligence positions "after taking into consideration the availability of preference eligibles for appointment to those positions" does not require the agency to hire preference eligibles ahead of more qualified candidates.²²

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Footnotes

- 1 5 U.S.C.A. §§ 2101 to 2954.
- 2 5 U.S.C.A. § 2108, discussed, generally, in Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
See also 5 U.S.C.A. § 2108a, pertaining to the treatment of certain individuals as veterans, disabled veterans, and preference eligibles.
- 3 5 U.S.C.A. § 2108(4).
- 4 5 U.S.C.A. § 2108(3)(A).
- 5 5 U.S.C.A. § 2108(3)(C).
An appellant who asserted a claim under the Veterans Employment Opportunities Act made a nonfrivolous jurisdictional allegation that he was a preference eligible, where the agency certified that the appellant was entitled to compensation for service connected disabilities rated at 30% or more, and the agency also certified that, according to its records, the appellant had served on active duty in the armed forces and was separated under honorable conditions. *Downs v. Department of Veterans Affairs*, 2008 MSPB 330, 2008 WL 4458194 (M.S.P.B. 2008).
- 6 5 U.S.C.A. § 2108(3)(D).
- 7 5 U.S.C.A. § 2108(3)(E).
- 8 5 U.S.C.A. § 2108(3)(F).
- 9 5 U.S.C.A. § 2108(3)(G).
- 10 5 U.S.C.A. § 2108(3)(H).
- 11 5 U.S.C.A. § 2108(3)(G), as discussed, generally, in Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 12 5 U.S.C.A. §§ 4301 to 4305.
- 13 5 U.S.C.A. §§ 7501 to 7543.
As to the separation and removal of civil service employees, generally, see Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 14 5 U.S.C.A. § 2108(4)(A), as discussed, generally, in Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 15 5 U.S.C.A. § 2108(4)(B), as discussed, generally, in Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 16 5 U.S.C.A. § 2108(5).
- 17 5 U.S.C.A. § 3312, discussed in Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 18 Am. Jur. 2d, Civil Service § 31.
- 19 Am. Jur. 2d, Civil Service § 42.

20 5 U.S.C.A. § 3112.
21 22 U.S.C.A. § 3941(c).
22 Wilks v. Department of Army, 91 M.S.P.R. 70, 2002 WL 422973 (M.S.P.B. 2002).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 99

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General

2. Federal Offices and Employment

§ 99. Positions in Department of Veterans Affairs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  113.1 to 116, 123

West's Key Number Digest, [United States](#)  1335

The Secretary of Veterans Affairs may give preference to qualified special disabled veterans¹ and qualified veterans of the Vietnam era² for employment in the Department of Veterans Affairs as veterans' benefits counselors and veterans' claims examiners and in positions to provide outreach services, to serve as veterans' representatives at certain educational institutions, or to provide readjustment counseling to veterans of the Vietnam era.³

Observation:

A dentist who was serving in the Veterans Health Administration failed to show that the Department of Veterans Affairs (DVA) discriminated against him due to his prior military service when the other candidate who was hired for a new position by competitive selection was also a veteran.⁴

Footnotes

- 1 "Special disabled veteran," for this purpose, is defined in [38 U.S.C.A. § 4211\(1\)](#).
- 2 "Veteran of the Vietnam era," for this purpose, is defined in [38 U.S.C.A. § 4211\(2\)](#).
- 3 [38 U.S.C.A. § 4214\(g\)](#).
- 4 As to job counseling, training, and placement of veterans, generally, see §§ [103](#) to [111](#).
[Ver Helst v. Department of Veterans Affairs](#), 104 Fed. Appx. 730 (Fed. Cir. 2004).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 100

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

C. Preferential Right to Office or Employment, in General

2. Federal Offices and Employment

§ 100. Employment by government contractors

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#) 🔑 113.1 to 115, 123, 153

West's Key Number Digest, [Public Contracts](#) 🔑 129

West's Key Number Digest, [United States](#) 🔑 1335

Any contract for a statutorily specified amount or more entered into by any federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States is required to contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified disabled veterans, veterans who have earned campaign badges or service medals, and recently separated veterans.¹ These provisions apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.² In addition to requiring affirmative action to employ such veterans under such contracts and subcontracts, and in order to promote the implementation of such requirement, the Secretary of Labor must prescribe regulations which require that each such contractor undertake in such contract to list immediately with the appropriate employment service delivery system or other specified job listing services all of its employment openings except that the contractor may exclude openings for executive and senior management positions, positions which are to be filled from within the contractor's organization, and positions lasting three days or less, and each such local office shall give such veterans priority in referral to such employment openings.³

If any covered veteran believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who must promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.⁴

Observation:

The manner in which the Secretary of Labor investigates a veteran's complaint alleging violations of the Vietnam Era Veterans Readjustment Assistance Act is committed to the Secretary's discretion and, thus, immune from judicial review,⁵ and except in a case of abandonment of the statutory responsibility,⁶ the same is true of the Secretary of Labor's decision to forego an enforcement action.⁷

There is no private cause of action available to enforce rights under the statutory provision⁸ requiring government contractors to undertake affirmative action to employ veterans.⁹

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Footnotes

- 1 38 U.S.C.A. § 4212(a)(3).
- 2 38 U.S.C.A. § 4212(a).
- 3 38 U.S.C.A. § 4212(a)(2).
- 4 38 U.S.C.A. § 4212(b).
- 5 *Greer v. Chao*, 492 F.3d 962 (8th Cir. 2007).
- 6 *Clementson v. Brock*, 806 F.2d 1402 (9th Cir. 1986).
- 7 *Harris v. McLaughlin*, 732 F. Supp. 780 (N.D. Ohio 1989) (decided under former 38 U.S.C.A. § 2012, since redesignated 38 U.S.C.A. § 4212); *Clementson v. Brock*, 806 F.2d 1402 (9th Cir. 1986) (decided under former 38 U.S.C.A. § 2012, since redesignated 38 U.S.C.A. § 4212); *Greer v. Chao*, 492 F.3d 962 (8th Cir. 2007).
- 8 38 U.S.C.A. § 4212(a).
- 9 *Barron v. Nightingale Roofing, Inc.*, 842 F.2d 20 (1st Cir. 1988) (under former 38 U.S.C.A. § 2012, subsequently redesignated 38 U.S.C.A. § 4212); *Brace v. Ohio State University*, 866 F. Supp. 1069, 95 Ed. Law Rep. 615 (S.D. Ohio 1994).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws VIII D Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

D. Retention Preferences and Seniority; Adverse Employment Actions Against Veterans

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  120

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  120

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77 Am. Jur. 2d Veterans and Veterans Laws § 101

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

D. Retention Preferences and Seniority; Adverse Employment Actions Against Veterans

§ 101. Retention preferences, seniority, and adverse employment actions against veterans, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  120

A.L.R. Library

[Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes, 58 A.L.R.2d 960](#)

Some state statutes direct a preference for veterans by giving veteran credits in determining the employee's seniority¹ or provide that the State, state bodies, or local subdivisions of the State give preferences in retention in employment to veterans honorably discharged from the Armed Forces.² Other state veterans' preference statutes provide that in any reduction of force, war veterans must be given preference for retention, and no war veteran employed under the provisions may be discharged except for inefficiency, incompetence, insubordination, or violation of working agreements.³ A state veterans' preference act has been construed as applicable to cases in which public employers reassign duties in times of revenue shortfalls and budget cuts so that, under such act, veterans have a preference over nonveteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to need such duties performed.⁴ However, while such statutes have been said to protect honorably discharged veterans from the ravages of the political spoils system, they have been construed as not preventing employers from abolishing positions in good faith.⁵

Statutes protecting veterans sometimes provide that such persons may not be removed from state or local positions except for good cause shown,⁶ after a fair and impartial hearing,⁷ and that such persons will hold their employment, position, or office during good behavior, and may not be removed for political reasons,⁸ or that an honorably discharged veteran holding a position in public employment may be removed from his or her position only for incompetency or misconduct,⁹ after a hearing.¹⁰

A statute restricting the right to discharge a veteran from municipal employment embraces de facto employees as well as de jure employees.¹¹ Yet, the opposite conclusion has also been reached.¹²

Provisions against discharging veterans without certain statutory protections may apply to only certain types of public employees.¹³

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Footnotes

- 1 [Mintzer v. Board of Educ. of City School Dist. of City of New York](#), 60 N.Y.2d 752, 469 N.Y.S.2d 665, 457 N.E.2d 772, 15 Ed. Law Rep. 339 (1983).
- 2 [West Coast Regional Water Supply Authority v. Harris](#), 604 So. 2d 892 (Fla. 1st DCA 1992), cause dismissed, 613 So. 2d 4 (Fla. 1992).
- 3 [James v. Department of Transp. of State of Idaho](#), 125 Idaho 892, 876 P.2d 590 (1994).
- 4 [Young v. City of Duluth](#), 386 N.W.2d 732 (Minn. 1986).
- 5 [Taylor v. City of New London](#), 536 N.W.2d 901 (Minn. Ct. App. 1995).
- 6 [Taylor v. Board of Educ. for School Dist. of City of Hoboken, Hudson County](#), 187 N.J. Super. 546, 455 A.2d 552, 9 Ed. Law Rep. 273 (App. Div. 1983).
- 7 § 102.
- 8 [Taylor v. Board of Educ. for School Dist. of City of Hoboken, Hudson County](#), 187 N.J. Super. 546, 455 A.2d 552, 9 Ed. Law Rep. 273 (App. Div. 1983).
- 9 [Harr v. City of Edina](#), 541 N.W.2d 603 (Minn. Ct. App. 1996).
As to the removal and dismissal of public officers and employees, generally, see Am. Jur. 2d, Public Officers and Employees[[Westlaw®\(r\): Search Query](#)].
- 10 § 102.
- 11 [Barkus v. Sadloch](#), 20 N.J. 551, 120 A.2d 465, 58 A.L.R.2d 954 (1956).
- 12 [Commissioner of Administration v. Kelley](#), 351 Mass. 686, 223 N.E.2d 670 (1967).
- 13 [Burns v. Quinones](#), 68 N.Y.2d 719, 506 N.Y.S.2d 316, 497 N.E.2d 683 (1986).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 102

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

D. Retention Preferences and Seniority; Adverse Employment Actions Against Veterans

§ 102. Notice and hearing; remedies and proceedings regarding employment actions against veterans

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  120

A.L.R. Library

[Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes, 58 A.L.R.2d 960](#)

Some state statutes specifically prohibit the taking of any employment action against a veteran absent notice and a hearing.¹ Some statutes prohibit the removal of certain veterans from state or local positions, without good cause shown² at a fair and impartial hearing,³ or prohibit the removal of an honorably discharged veteran from a position of public employment except for incompetency or misconduct⁴ proven after a hearing.⁵ Similarly, under statutes in some states, when a public employer terminates the position of employment held by a veteran, written notice must be given to the veteran.⁶ However, certain statutes entitling veterans to notice and hearing prior to discharge may not apply to certain types of employees.⁷

Observation:

When a veteran voluntarily went on disability leave which lasted for over three years and was subsequently reemployed by a city but not at his former position, he had ceased to be an employee of the city during his leave and, therefore, had not been "removed" from his job within the meaning of a state veterans preference act so as to be entitled to a hearing upon his reemployment at a lower level position.⁸

Under a statute prohibiting the taking of any employment action against a veteran until after there has been notice and a hearing, failure to give notice and a hearing may subject a violator to criminal prosecution⁹ but does not necessarily entitle the affected veteran to reinstatement with back pay.¹⁰ The veteran may be required to file a written protest of the violation of the statute or be deemed to have waived its protections.¹¹ Under other statutes, relief for such violations may be had by petitioning for a writ of mandamus or by requesting an order from the State Commissioner of Veterans Affairs.¹²

Practice Tip:

Laches may bar the full recovery of a veteran's back wages, despite the violation of the veteran's rights in discharging him or her without meeting statutorily required procedures and conditions, based on the veteran's inaction or failure to respond to the public employer's attempts to remedy such violation.¹³

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Footnotes

- 1 [Jackson v. Detroit Police Chief](#), 201 Mich. App. 173, 506 N.W.2d 251 (1993); [Anderson v. City of Minneapolis](#), 503 N.W.2d 780 (Minn. 1993).
A sheriff and the sheriff's employees, a sheriff's department, is a "public department" so that an honorably discharged veteran holding an office or employment in any public department has the right to a hearing regarding removal, transfer, or suspension under the State Veterans Preference Act (VPA); it is an agency of the county. [Leelanau County Sheriff v. Kiessel](#), 297 Mich. App. 285, 824 N.W.2d 576 (2012).
As to notice and hearing prior to removal, suspension, or demotion, of civil servants, generally, see Am. Jur. 2d, Civil Service[Westlaw®(r): Search Query].
- 2 [§ 101](#).
- 3 [Taylor v. Board of Educ. for School Dist. of City of Hoboken, Hudson County](#), 187 N.J. Super. 546, 455 A.2d 552, 9 Ed. Law Rep. 273 (App. Div. 1983).
- 4 [§ 101](#).
- 5 [Harr v. City of Edina](#), 541 N.W.2d 603 (Minn. Ct. App. 1996).
- 6 [Young v. City of Duluth](#), 386 N.W.2d 732 (Minn. 1986).
A director of ambulance services was not given due process, in connection with his termination by a county hospital, as required by a State Veterans Preference Act where, among other things, a letter setting forth

expectations for an improved relationship between himself and a nursing department did not alert him to his impending dismissal. [Glandon v. Keokuk County Health Center](#), 408 F. Supp. 2d 759 (S.D. Iowa 2005).
7 [Campbell v. Atlantic County Bd. of Freeholders](#), 145 N.J. Super. 316, 367 A.2d 912 (Law Div. 1976),
judgment aff'd, 158 N.J. Super. 14, 385 A.2d 311 (App. Div. 1978).
8 [Anderson v. City of Minneapolis](#), 503 N.W.2d 780 (Minn. 1993).
9 [Jackson v. Detroit Police Chief](#), 201 Mich. App. 173, 506 N.W.2d 251 (1993).
10 [Jackson v. Detroit Police Chief](#), 201 Mich. App. 173, 506 N.W.2d 251 (1993).
11 [Jackson v. Detroit Police Chief](#), 201 Mich. App. 173, 506 N.W.2d 251 (1993).
12 [Young v. City of Duluth](#), 386 N.W.2d 732 (Minn. 1986).
13 [Harr v. City of Edina](#), 541 N.W.2d 603 (Minn. Ct. App. 1996).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws VIII E Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  105

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End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 103

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 103. Functions and duties of Assistant Secretary of Labor for Veterans Employment and Training

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105(1)

The Assistant Secretary of Labor for Veterans Employment and Training has specified duties with regard to the training and employment of veterans,¹ including obligations to, except as expressly provided otherwise, carry out all provisions of applicable statutes² and administer all programs under the jurisdiction of the Secretary of Labor for the provision of employment and training services designed to meet the needs of all veterans and persons eligible for services under the statute,³ in order to make maximum use of available resources in meeting such needs, encourage all such programs and all grantees and contractors under such programs to enter into cooperative arrangements with private industry and business concerns (including small business concerns owned by veterans or disabled veterans), educational institutions, trade associations, and labor unions;⁴ insure that maximum effectiveness and efficiency are achieved in providing services and assistance to eligible veterans under all such programs by coordinating and consulting with the Secretary of Veterans Affairs with respect to programs conducted under other specified provisions, with particular emphasis on coordination of such programs with readjustment counseling activities, apprenticeship or other on-the-job training programs, and rehabilitation and training activities;⁵ and insure that job placement activities are carried out in coordination and cooperation with appropriate state public employment service officials.⁶

Provision is also made by statute with regard to cooperation of other federal agencies and the Department of Defense with the Secretary of Labor, in the manners specified by statute, with regard to the provisions pertaining to job counseling, training, and placement service for veterans;⁷ the estimation of funds for administration of the provisions, and other specified provisions pertaining to veteran training and employment;⁸ and authorization of appropriations for the purposes of the applicable provisions as to job counseling, training, and placement service for veterans.⁹

The Secretary of Labor is required to establish specified administrative controls.¹⁰ Provision is also made as to the establishment of definitive performance standards for determining compliance by the state public employment service agencies with the provisions of applicable provisions as to veterans' job training, counseling, placement, and employment¹¹ and as to specified reporting requirements of the Secretary of Labor with regard to the veterans' job counseling, training, and placement service provisions.¹²

The Secretary of Labor also has certain responsibilities to advise and provide information as specified to the Secretary of Veterans Affairs.¹³ The Secretary of Labor also has specified obligations in connection with the conducting of annual studies of unemployment among specified categories of veterans.¹⁴

In addition to other statutes, specific provision has also been made regarding job counseling, training, and placement service for veterans.¹⁵

CUMULATIVE SUPPLEMENT

Statutes:

[34 U.S.C.A. § 10651a](#), as added effective August 8, 2020, establishes a Veteran Treatment Court Program to provide grants and technical assistance to court systems that have adopted a Veterans Treatment Court Program, or have filed a notice of intent to establish a Veterans Treatment Court Program with the Secretary of Veterans Affairs. The Veterans Treatment Court Program includes the grant programs relating to veterans treatment courts carried out by the Attorney General pursuant to the Omnibus Crime Control and Safe Streets Act of 1968 ([34 U.S.C.A. §§ 10651, 10701](#)).

[END OF SUPPLEMENT]

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Footnotes

- | | |
|----|-------------------------------------------------------------|
| 1 | 38 U.S.C.A. § 4102A(b) . |
| 2 | 38 U.S.C.A. §§ 4100 to 4114, 4301 to 4335 . |
| 3 | 38 U.S.C.A. § 4102A(b)(1) . |
| 4 | 38 U.S.C.A. § 4102A(b)(2) . |
| 5 | 38 U.S.C.A. § 4102A(b)(3) . |
| 6 | 38 U.S.C.A. § 4102A(b)(4) . |
| 7 | 38 U.S.C.A. § 4105 . |
| 8 | 38 U.S.C.A. § 4106(a) . |
| 9 | 38 U.S.C.A. § 4106(b) . |
| 10 | 38 U.S.C.A. § 4107(a) . |
| 11 | 38 U.S.C.A. § 4107(b) . |
| 12 | 38 U.S.C.A. § 4107(b), (c) . |
| 13 | 38 U.S.C.A. § 4108(a) . |
| 14 | 38 U.S.C.A. § 4110A . |
| 15 | 38 U.S.C.A. §§ 4100 to 4114 . |

77 Am. Jur. 2d Veterans and Veterans Laws § 104

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 104. Employment and job advancement in federal government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

It is the policy of the United States and the purpose of a specified provision of federal law to promote the maximum of employment and job advancement opportunities within the federal government for qualified covered veterans who are qualified for such employment and advancement.¹ To further this purpose, statutorily specified veterans are eligible, in accordance with regulations which the Office of Personnel Management is required to prescribe, for veterans recruitment appointments, and for subsequent career-conditional appointments, under the terms and conditions specified by statute and with specified exceptions.² Under another provision, each agency is required to include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such agency, as required by a provision of the Rehabilitation Act of 1973,³ a separate specification of plans, in accordance with specified regulations to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of the statute.⁴

Observation:

There is a difference of opinion as to whether this provision⁵ provides a private right of action. It has been held that the reference in the statute to the Rehabilitation Act provision⁶ directly connects a plaintiff to an express right of action and that the statute therefore affords a private right of action.⁷ Another line of authority holds that the statute creates no private right of action, notwithstanding its reference to an affirmative action plan required by the Rehabilitation Act.⁸

Provision is made as to review and evaluation of the implementation of the statute,⁹ and the activities of each agency to carry out its purpose and provisions,¹⁰ and as to certain reporting requirements of the Office of Personnel Management with regard to activities carried out under the statute.¹¹

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Footnotes

- 1 38 U.S.C.A. § 4214(a)(1).
- 2 38 U.S.C.A. § 4214(b)(1).
- 3 29 U.S.C.A. § 791(b).
For this purpose, "agency" means any agency of the federal government or the District of Columbia, including any executive agency and the United States Postal Service and the Postal Regulatory Commission.
- 4 38 U.S.C.A. § 4214(a)(2).
38 U.S.C.A. § 4214(c).
As to preferential rights of veterans to federal employment positions or offices, generally, see §§ 98 to 100.
- 5 38 U.S.C.A. § 4214(c).
- 6 29 U.S.C.A. § 791(b).
- 7 *Blizzard v. Dalton*, 876 F. Supp. 95, 8 A.D.D. 695 (E.D. Va. 1995).
- 8 *Antol v. Perry*, 82 F.3d 1291, 16 A.D.D. 653 (3d Cir. 1996).
- 9 38 U.S.C.A. § 4214.
- 10 38 U.S.C.A. § 4214(d).
- 11 38 U.S.C.A. § 4214(e).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 105

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 105. Duties of Equal Employment Opportunity Commission

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105(1)

The Equal Employment Opportunity Commission, after consultation with the Federal Interagency Committee on Employees who are Individuals with Disabilities, is required to develop and recommend to the Secretary of Labor for referral to the appropriate state agencies policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under state vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals.¹ The Secretary must also encourage such state agencies to adopt and implement such policies and procedures.²

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Footnotes

- ¹ [29 U.S.C.A. § 791\(c\)](#).
As to federal statutory provisions pertaining to training and rehabilitation for veterans with service connected disabilities, see §§ [67](#), [68](#).
- ² [29 U.S.C.A. § 791\(c\)](#).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 106

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 106. Functions and duties of administrative officers under Secretary of Labor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105(1)

There has been established within the Department of Labor an Assistant Secretary of Labor for Veterans Employment and Training appointed by the President by and with the advice and consent of the Senate, who is to formulate and implement all departmental policies and procedures to carry out the purposes of various statutes pertaining to job training and employment of veterans¹ and all other Department of Labor employment, unemployment, and training programs to the extent they affect veterans.² Provision is also made with regard to a Deputy Assistant Secretary who is to perform such functions as the Assistant Secretary of Labor for Veterans Employment and Training prescribes.³

The Assistant Secretary of Labor for Veterans Employment and Training is required to promote and monitor participation of qualified veterans and eligible persons in employment and training opportunities under Title I of the Workforce Innovation and Opportunity Act and other federally funded employment and training programs.⁴

Provision is also made for the assignment by the Secretary to each region for which the Secretary operates a regional office a representative of the Veterans Employment and Training Service to serve as the Regional Administrator for Veterans Employment and Training in such region⁵ and with statutorily specified duties.⁶

Statutes also provide for the assignment by the Secretary to each state a representative of the Veterans Employment and Training Service to serve as the Director for Veterans Employment and Training, the assignment of full-time federal clerical or other support personnel to each such Director, and the assignment to the states of Assistant Directors for Veterans Employment and Training.⁷

Footnotes

- 1 38 U.S.C.A. § 4102A(a)(1)(A).
- 2 38 U.S.C.A. § 4102A(a)(1)(B).
- 3 38 U.S.C.A. § 4102A(a)(3)(A).
- 4 38 U.S.C.A. § 4102A(d).
- 5 38 U.S.C.A. § 4102A(e)(1).
- 6 38 U.S.C.A. § 4102A(e)(2).
- 7 38 U.S.C.A. § 4103.

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 107

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 107. Disabled veterans' outreach program specialists

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Provision is made by statute for the employment by states, subject to approval by the Secretary of Labor, of disabled veterans' outreach program specialists to carry out intensive job counseling and training services and facilitate placements¹ in order to meet the employment needs of eligible veterans, subject to the following priority in the provision of services: (1) services to special disabled veterans;² (2) services to other disabled veterans;³ and (3) services to other eligible veterans in accordance with priorities determined by the Secretary, as specified.⁴ In the provision of such services, maximum emphasis in meeting the employment needs of veterans must be placed on assisting economically or educationally disadvantaged veterans.⁵ In facilitating placement of a veteran under this program, a disabled veterans' outreach program specialist must help to identify job opportunities that are appropriate for the veteran's employment goals and assist that veteran in developing a cover letter and resume that are targeted for those particular jobs.⁶

A full-time disabled veterans' outreach program specialist may perform only duties related to meeting the employment needs of eligible veterans, as described in the foregoing provisions, and may not perform other non-veteran-related duties that detract from the specialist's ability to perform the specialist's duties related to meeting the employment needs of eligible veterans.⁷ The Secretary must conduct regular audits to ensure compliance with this limitation. If, on the basis of such audit, the Secretary determines that a state is not in compliance, the Secretary may reduce the amount of a grant made to the state.⁸

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Footnotes

- ¹ 38 U.S.C.A. § 4103A(a)(1).
² 38 U.S.C.A. § 4103A(a)(1)(A).

- 3 38 U.S.C.A. § 4103A(a)(1)(B).
- 4 38 U.S.C.A. § 4103A(a)(1)(C).
- 5 38 U.S.C.A. § 4103A(a)(2).
- 6 38 U.S.C.A. § 4103A(a)(3).
- 7 38 U.S.C.A. § 4103A(d)(1).
- 8 38 U.S.C.A. § 4103A(d)(2).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 108

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 108. Local veterans' employment representatives

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Provision is made by statute with regard to local veterans' employment representatives.¹ Subject to approval by the Secretary of Labor, a State must employ such full- and part-time local veterans' employment representatives as the State determines appropriate and efficient to carry out employment, training, and placement services for veterans.² The functions and duties of such representatives include conducting outreach to employers to assist veterans in gaining employment, including conducting seminars, job search workshops, and establishing job search groups,³ and facilitating employment, training, and placement services furnished to veterans in a state under the applicable state employment service delivery systems.⁴

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- ¹ 38 U.S.C.A. § 4104.
- ² 38 U.S.C.A. § 4104(a).
Employment of qualified veterans or eligible persons, see 38 U.S.C.A. § 4104(c).
- ³ 38 U.S.C.A. § 4104(b)(1).
- ⁴ 38 U.S.C.A. § 4104(b)(2).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 109

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 109. Advisory Committee on Veterans Employment, Training, and Employer Outreach

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

There has been established within the Department of Labor an advisory committee known as the Advisory Committee on Veterans Employment, Training, and Employer Outreach,¹ with statutorily specified functions,² including the assessment of employment and training needs of veterans,³ the determination of the extent to which the programs and activities of the Department of Labor are meeting such needs,⁴ and the carrying out of such other activities as are necessary to make the reports and recommendations required by statute.⁵

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Footnotes

- | | |
|---|--------------------------------|
| 1 | 38 U.S.C.A. § 4110(a)(1). |
| 2 | 38 U.S.C.A. § 4110(a)(2), (f). |
| 3 | 38 U.S.C.A. § 4110(a)(2)(A). |
| 4 | 38 U.S.C.A. § 4110(a)(2)(B). |
| 5 | 38 U.S.C.A. § 4110(a)(2)(E). |

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 110

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 110. National Veterans Employment and Training Institute

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

In order to provide for such training as the Secretary of Labor considers necessary and appropriate for the efficient and effective provision of employment, job training, intensive services, placement, job-search, and related services to veterans,¹ the National Veterans Employment and Training Institute is provided for by statute.² Each disabled veterans' outreach program specialist and local veterans' employment representative who receives training provided by the Institute, or its successor, must be given a final examination to evaluate the specialist's or representative's performance in receiving such training.³

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Footnotes

- [1](#) [38 U.S.C.A. § 4109\(a\).](#)
- [2](#) [38 U.S.C.A. § 4109.](#)
- [3](#) [38 U.S.C.A. § 4109\(d\)\(1\).](#)

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 111

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

E. Job Counseling, Training, and Placement

§ 111. Effect of compensation received on eligibility for employment assistance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  105

Any amounts received as pay or allowances by any person while serving on active duty, any period of time during which such person served on active duty, and any amounts received under various provisions of the veterans' laws, by an eligible veteran, are to be disregarded in determining eligibility under any public service employment program, any emergency employment program, any job training program assisted under the Economic Opportunity Act of 1964, any employment or training program assisted under Title I of the Workforce Innovation and Opportunity Act, or any other employment or training or related program financed in whole or in part with federal funds.¹

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Footnotes

1 [38 U.S.C.A. § 4213.](#)

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77 Am. Jur. 2d Veterans and Veterans Laws VIII F Refs.

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.


VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122

West's Key Number Digest, [Public Employment](#)  333, 457, 481, 505, 514 to 516, 518, 635, 654, 658(3), 791, 810, 811

A.L.R. Library

A.L.R. Index, Veterans and Veterans Administration

West's A.L.R. Digest, [Armed Services](#)  122

West's A.L.R. Digest, [Public Employment](#)  333, 457, 481, 505, 514 to 516, 518, 635, 654, 658(3), 791, 810, 811

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77 Am. Jur. 2d Veterans and Veterans Laws § 112

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

a. Assistance in Enforcement of Employment or Reemployment Rights; Complaint and Investigation

§ 112. Assistance of Secretary of Labor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

The procedures for assistance, enforcement, and investigation of one's right to employment or reemployment after service in the Armed Forces are set forth in the Uniformed Services Employment and Reemployment Rights Act.¹ The Secretary of Labor, through the Veterans Employment and Training Service, must provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under the applicable statutory provisions.² In providing such assistance, the Secretary may request the assistance of existing federal and state agencies engaged in similar or related activities and utilize the assistance of volunteers.³

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Footnotes

- ¹ [38 U.S.C.A. §§ 4321 to 4327.](#)
- ² [38 U.S.C.A. § 4321.](#)
- ³ [38 U.S.C.A. § 4321.](#)

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 113

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

a. Assistance in Enforcement of Employment or Reemployment Rights; Complaint and Investigation

§ 113. Complaint to Secretary of Labor; investigation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

Treatises and Practice Aids

Complaint to Secretary of Labor under the Uniformed Services Employment and Reemployment Rights Act, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

Investigation and notice entitling complainant to proceed, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

Investigation and notice entitling complainant to proceed—Enforcement of subpoenas and orders, Federal Procedure, L. Ed., Veterans and Veterans Affairs[[Westlaw®\(r\): Search Query](#)]

A claimant under the Uniformed Services Employment and Reemployment Rights Act may file a complaint with the Secretary of Labor, who is obligated to investigate such complaint.¹ If the Secretary determines as a result of the investigation that the action alleged in the complaint occurred, he or she must attempt to resolve the complaint by making reasonable efforts to insure that the person or entity named in the complaint complies with the statutes pertaining to employment and reemployment rights of veterans.² If the Secretary's efforts do not resolve the complaint, he or she must notify the person who submitted the complaint of the results of the investigation,³ and of the complainant's entitlement to proceed under the enforcement of rights provisions provided under separate statutes pertaining to the enforcement of rights with respect to a state or private employer,⁴ in the case

of a person submitting a complaint against a state or private employer or pertaining to the enforcement of rights with respect to federal executive agencies⁵ or in the case of a person submitting a complaint against a federal executive agency or the Office of Personnel Management.⁶

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Footnotes

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|---|---------------------------|
| 1 | 38 U.S.C.A. § 4322. |
| 2 | 38 U.S.C.A. § 4322(d). |
| 3 | 38 U.S.C.A. § 4322(e)(1). |
| 4 | 38 U.S.C.A. § 4323. |
| 5 | 38 U.S.C.A. § 4324. |
| 6 | 38 U.S.C.A. § 4322(e)(2). |

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 114

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

b. Disputes Concerning Federal Executive Agencies; Merit Systems Protection Board Proceedings

§ 114. Referral or submission of complaint to Merit Systems Protection Board

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

Treatises and Practice Aids

Request for referral to Special Counsel following notice of unsuccessful effort to resolve complaint, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) specifically provides the procedure to be followed in enforcing employment and reemployment rights of veterans in connection with federal executive agencies.¹ USERRA does not authorize an action against the federal government, as an employer, in federal district court; rather, the Act confers jurisdiction in such cases upon the Merit Systems Protection Board (MSPB), and the MSPB's decisions are subject to review in the Court of Appeals for the Federal Circuit.²

A person who receives notification from the Secretary of Labor may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board.³ Not later than 60 days after receiving such a request, the Secretary must refer the complaint to the Office of Special Counsel.⁴ If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred is entitled to the rights or benefits sought, the Special Counsel, upon the request of the person submitting the complaint, may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint

before the Merit Systems Protection Board.⁵ Not later than 60 days after the date the Special Counsel receives the referral, the Special Counsel must make a decision whether to represent the person before the Merit Systems Protection Board and notify such person in writing of such decision.⁶

Alternatively, a person may submit a complaint against a federal executive agency or the Office of Personnel Management under the employment and reemployment rights statutes⁷ directly to the Merit Systems Protection Board if that person has chosen not to apply to the Secretary for assistance regarding a complaint,⁸ has received a notification from the Secretary regarding such person's entitlement to proceed under the enforcement of rights provisions,⁹ has chosen not to be represented before the Board by the Special Counsel,¹⁰ or has received a notification of a decision from the Special Counsel declining to initiate an action and represent the person before the Merit Systems Protection Board.¹¹

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Footnotes

- 1 38 U.S.C.A. § 4324.
38 U.S.C.A. § 4325 provides the procedures for enforcement of rights with respect to certain federal agencies.
- 2 *Padilla-Ruiz v. U.S.*, 893 F. Supp. 2d 301 (D.P.R. 2012), *aff'd in part, vacated in part on other grounds, remanded*, 593 Fed. Appx. 1 (1st Cir. 2015).
- 3 38 U.S.C.A. § 4324(a)(1).
- 4 38 U.S.C.A. § 4324(a)(1).
- 5 38 U.S.C.A. § 4324(a)(2)(A).
- 6 38 U.S.C.A. § 4324(a)(2)(B).
- 7 38 U.S.C.A. §§ 4321 to 4327.
- 8 38 U.S.C.A. § 4324(b)(1).
- 9 38 U.S.C.A. § 4324(b)(2).
- 10 38 U.S.C.A. § 4324(b)(3).
- 11 38 U.S.C.A. § 4324(b)(4).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 115

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

b. Disputes Concerning Federal Executive Agencies; Merit Systems Protection Board Proceedings

§ 115. Adjudication by Merit Systems Protection Board; administrative remedy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  [122\(1\)](#), [122\(6\)](#)

Treatises and Practice Aids

Adjudication by Board; relief, Federal Procedure, L. Ed., Veterans and Veterans Affairs [\[Westlaw®\(r\): Search Query\]](#)

The Merit Systems Protection Board is to adjudicate any complaint brought before it.¹ If the Board determines that a federal executive agency or the Office of Personnel Management has not complied with the provisions² relating to the employment or reemployment of a person by the agency, the Board must enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.³ The Board has the authority, for instance, to order a remedy for an agency's improper denial of military leave benefits by requiring agencies to correct the employee's leave record to reflect a proper accounting of military leave.⁴

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Footnotes

¹ [38 U.S.C.A. § 4324\(c\)\(1\)](#).

- 2 38 U.S.C.A. §§ 4301 to 4335.
- 3 38 U.S.C.A. § 4324(c)(2).
- 4 Haskins v. Department of Navy, 2007 MSPB 234, 2007 WL 2993568 (M.S.P.B. 2007).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 116

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

c. Judicial Enforcement Proceedings

§ 116. Right of action; commencement of proceedings

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

Treatises and Practice Aids

Jurisdiction and venue, Federal Procedure, L. Ed., Veterans and Veterans Affairs[\[Westlaw®\(r\): Search Query\]](#)

Complaint; timeliness, Federal Procedure, L. Ed., Veterans and Veterans Affairs[\[Westlaw®\(r\): Search Query\]](#)

Parties, Federal Procedure, L. Ed., Veterans and Veterans Affairs[\[Westlaw®\(r\): Search Query\]](#)

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a person who receives from the Secretary of Labor a notification relating to a state, as an employer, or a private employer may request that the Secretary refer the complaint to the Attorney General.¹ If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for appropriate relief for such person in an appropriate United States district court.² Not later than 60 days after the date the Attorney General receives such a referral, the Attorney General must make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and notify such person in writing of such decision.³ A person may commence an action for relief with respect to a complaint if that person has chosen not to apply to the Secretary for assistance regarding the complaint,⁴ has

chosen not to request that the Secretary refer the complaint to the Attorney General,⁵ or has been refused representation by the Attorney General with respect to the complaint.⁶

An action under USERRA may be initiated only by a person claiming rights or benefits under such provisions, or by the United States, in the case of an action against a state.⁷

State statutes dealing with the reemployment of veterans also sometimes provide veterans with a right to bring an independent action to enforce their reemployment rights.⁸ Under applicable state statutes, a prosecuting attorney of the county in which the employer is located may be authorized to bring an action in court to obtain an order to specifically require the employer to comply with the applicable state statutory provisions regarding reemployment rights of veterans.⁹

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Footnotes

- | | |
|---|----------------------------------------------------------------------|
| 1 | 38 U.S.C.A. § 4323(a)(1). |
| 2 | 38 U.S.C.A. § 4323(a)(1). |
| 3 | 38 U.S.C.A. § 4323(a)(2). |
| 4 | 38 U.S.C.A. § 4323(a)(3)(A). |
| 5 | 38 U.S.C.A. § 4323(a)(3)(B). |
| 6 | 38 U.S.C.A. § 4323(a)(3)(C). |
| 7 | 38 U.S.C.A. § 4323(f). |
| 8 | Nichols v. Snohomish County, 109 Wash. 2d 613, 746 P.2d 1208 (1987). |
| 9 | Nichols v. Snohomish County, 109 Wash. 2d 613, 746 P.2d 1208 (1987). |

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 117

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

c. Judicial Enforcement Proceedings

§ 117. Limitations of actions; abandonment of rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

There is no limit on the period for filing a complaint or claim under the Federal Uniformed Service Employment and Reemployment Rights Act (USERRA).¹ Some state statutes, however, do prescribe statutes of limitations for claims made under their veterans' rights laws.²

Because an employee who is in military service retains his or her USERRA antidiscrimination rights despite the passage of time, an employee's failure to promptly challenge an adverse action by his or her employer should not be given undue weight in the abandonment inquiry although an extensive delay in bringing a USERRA claim might offer some support for a conclusion that the employee has abandoned his or her USERRA rights.³

CUMULATIVE SUPPLEMENT

Cases:

Cause of action by former lieutenant colonel for Tennessee National Guard against Guard for alleged violation of Uniformed Services Employment and Reemployment Rights Act (USERRA), based on Guard's alleged denial of reemployment following lieutenant colonel's completion of tour with Naval War College, accrued prior to filing of initial suit against Guard based on same facts, which was not "on or after" effective date of State's statutory waiver of sovereign immunity from claims brought under USERRA, and not on effective date of waiver when he attained right to sue. [38 U.S.C.A. § 4301 et seq.](#); [Tenn. Code Ann. § 29-20-208](#). [Smith v. Tennessee National Guard](#), 551 S.W.3d 702 (Tenn. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 38 U.S.C.A. § 4327(b).
- 2 Ryan v. Berwick Industries, Inc., 30 F. Supp. 2d 834 (M.D. Pa. 1998) (applying Pennsylvania law).
- 3 Erickson v. U.S. Postal Service, 636 F.3d 1353 (Fed. Cir. 2011).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 118

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

c. Judicial Enforcement Proceedings

§ 118. Jurisdiction and venue

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(2)

The federal district courts have statutorily specified jurisdiction upon the filing of a complaint, motion, petition, or other appropriate pleading by or on behalf of a person claiming a right or benefit under the federal statutory provisions regarding the rights of veterans to employment or reemployment.¹ Specifically, in the case of an action against a state (as an employer) or a private employer commenced by the United States² or an action against a private employer by a person,³ the federal district courts have jurisdiction over the action. In the case of an action against a State (as an employer) by a person, the action may be brought in a state court of competent jurisdiction in accordance with the laws of the state.⁴

In the case of an action by the United States against a State (as an employer), the action may proceed in the federal district court for any district in which the State exercises any authority or carries out any function.⁵ In the case of an action against a private employer, the action may proceed in the federal district court for any district in which the private employer of the person maintains a place of business.⁶

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Footnotes

- ¹ 38 U.S.C.A. § 4323(b).
- ² 38 U.S.C.A. § 4323(b)(1).
- ³ 38 U.S.C.A. § 4323(b)(3).
- ⁴ 38 U.S.C.A. § 4323(b)(2).

5 38 U.S.C.A. § 4323(c)(1).

6 38 U.S.C.A. § 4323(c)(1).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 119

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

c. Judicial Enforcement Proceedings

§ 119. Evidence; burden of proof; construction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(4)

Under the Uniformed Service Employment and Reemployment Rights Act (USERRA),¹ there must be an initial showing by the employee, by a preponderance of the evidence,² that military status was at least a motivating or substantial factor in the employer's action³ whereupon the employer must prove, by a preponderance of evidence, that the action would have been taken despite the protected status.⁴ The burden of persuasion, as well as production, is shifted to the employer.⁵

Discriminatory motivation under USERRA is a question of fact.⁶ Such motivation may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, the employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.⁷

In order to prevail on a claim of discrimination under USERRA, an employee need not show that his or her military obligations constituted the sole reason for an adverse employment action, only that the employer was motivated in part by this impermissible factor.⁸

Because the USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries.⁹

CUMULATIVE SUPPLEMENT

Cases:

Evidence that coworker received warning letter for violating employer's discounted shipping policy, but that employee was terminated for violating same policy raised inference that termination was motivated by employee's military service, in determining whether employee established prima facie case of discrimination and retaliation under Uniformed Services Employment and Reemployment Rights Act (USERRA); coworker and employee violated same policy and both allowed an authorized user to ship packages with discount. 38 U.S.C.A. § 4311. [Savage v. Federal Express Corporation](#), 856 F.3d 440 (6th Cir. 2017).

Evidence of hostile e-mail sent by supervisor's assistant to comparator was relevant to burden of public employee, a reservist and an agent at the Drug Enforcement Agency (DEA), to support inference that non-selections for promotions resulted from supervisor's hostility towards reservists or activity under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and thus Merit Systems Protection Board (MSPB) abused its discretion by excluding e-mail and supervisor's testimony and preventing public employee from questioning supervisor about e-mail in USERRA action; comparator was a reservist who worked at the same location as the employee and who had filed a USERRA claim naming supervisor. 38 U.S.C.A. § 4311(a). [Sharpe v. Department of Justice](#), 916 F.3d 1376 (Fed. Cir. 2019).

Merit System Protection Board's finding that Health Resources and Services Administration (HRSA) did not violate veteran's Uniformed Services Employment and Reemployment Rights Act (USERRA) rights when it did not select him for position of Public Health Advisor (PHA) was supported by substantial evidence; veteran failed to prove by preponderant circumstantial evidence that his military service, which was completed 47 years prior to HRSA's selection decision, or his prior USERRA activity, was motivating factor in decision, and HRSA's experts credibly testified that they were unaware of any hostility toward military service members within agency. 5 U.S.C.A. § 7703(c). [Jones v. Department of Health and Human Services](#), 718 Fed. Appx. 958 (Fed. Cir. 2017).

Unsuccessful applicant for position of employment with the Department of Health and Human Services failed to establish that his military service was a substantial or motivating factor for his rejection, and thus could not establish claim for Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA); officer determining that applicant lacked necessary experience was himself a veteran and there was no evidence that he had any hostility toward veterans or would have discriminated on that basis, and conclusion that applicant lacked necessary experience was well supported by documentary evidence in the record. 38 U.S.C.A. § 4311. [Jones v. Department of Health and Human Services](#), 705 Fed. Appx. 972 (Fed. Cir. 2017).

There was no evidence, circumstantial or direct, that employer expressed any hostility toward the military, those enrolled in the military, or military service, as would support employee's discrimination claim under Uniformed Services Employment and Reemployment Rights Act (USERRA) arising out of employer's failure to promptly reemploy her upon her return from military service leave; company owner testified that he would have replaced and not rehired any employee who was gone for three weeks, regardless of the reason, and there was no indicia of discrimination, as employer did not question employee's need or desire to serve her country, employer did not call up her commanding officer and ask whether she was really present and required to be on leave, and no dissatisfaction was expressed when employee informed employer of her military service obligations. 38 U.S.C.A. § 4311. [Mace v. Willis](#), 259 F. Supp. 3d 1007 (D.S.D. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 38 U.S.C.A. §§ 4301 to 4335.
- 2 *Slusher v. Shelbyville Hosp. Corp.*, 805 F.3d 211 (6th Cir. 2015); *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Cir. 2005); *Brown v. State*, 195 Vt. 342, 2013 VT 112, 88 A.3d 402 (2013), cert. denied, 134 S. Ct. 2144, 188 L. Ed. 2d 1126 (2014).
- 3 *Gummo v. Village of Depew, N.Y.*, 159 F.3d 770 (2d Cir. 1998); *Slusher v. Shelbyville Hosp. Corp.*, 805 F.3d 211 (6th Cir. 2015); *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002); *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Cir. 2005); *Crawford v. Department of Transp.*, 373 F.3d 1155 (Fed. Cir. 2004); *Vahey v. General Motors Company*, 985 F. Supp. 2d 51 (D.D.C. 2013).
- 4 *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11 (1st Cir. 2007); *Slusher v. Shelbyville Hosp. Corp.*, 805 F.3d 211 (6th Cir. 2015); *Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544 (8th Cir. 2005); *Sheehan v. Department of Navy*, 240 F.3d 1009, 175 A.L.R. Fed. 763 (Fed. Cir. 2001); *Dominguez v. Miami-Dade County*, 669 F. Supp. 2d 1340 (S.D. Fla. 2009), aff'd, 416 Fed. Appx. 884 (11th Cir. 2011).
- 5 *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002).
The failure of the administrative judge to inform the parties of the shifting burdens of proof prejudiced the parties' substantive rights and required remand where the agency, unaware of its burden of proof, might have submitted evidence only in rebuttal, not in support of its burden of proof to show it that would have made the same decision anyway, for a valid reason. *Matz v. Department of Veterans Affairs*, 91 M.S.P.R. 265, 2002 WL 522604 (M.S.P.B. 2002).
- 6 *Staub v. Proctor Hosp.*, 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011).
- 7 *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).
Evidence that an employee's military service was mentioned in an action plan and a supervisor's comment that the employee needed to decide whether he wanted to be principal or soldier was sufficient to show that the employee's membership in the military reserves was a motivating factor in the employer's decision not to recommend that he be certified as a principal. *Smith v. School Bd. of Polk County, Florida*, 205 F. Supp. 2d 1308, 166 Ed. Law Rep. 588 (M.D. Fla. 2002).
- 8 *Gillie-Harp v. Cardinal Health, Inc.*, 249 F. Supp. 2d 1113 (W.D. Wis. 2003).
- 9 *Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544 (8th Cir. 2005).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 120

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings


1. Under Uniformed Services Employment and Reemployment Rights Act and Similar State Statutes

c. Judicial Enforcement Proceedings

§ 120. Remedies; costs and fees

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(6)

In an action under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal district court may require an employer to comply with the employment and reemployment rights provisions,¹ to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions,² and to pay to the person an amount equal to that paid for compensation for any loss of wages or benefits as liquidated damages if the court determines that the failure to comply with the applicable statutory provisions was willful.³

Caution:

There is a duty to mitigate damages in a USERRA action which requires plaintiff to use reasonable diligence in attempting to find other suitable employment.⁴

No fees or court costs will be charged or taxed against any person claiming rights under the veterans' employment or reemployment rights statutes,⁵ and filing fees to prepay for a suit against a former employer have been held included within this provision.⁶ However, the court may award any such person who prevails in the action or proceeding reasonable attorney's fees, expert witness fees, and other litigation expenses.⁷

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Footnotes

1 38 U.S.C.A. § 4323(d)(1)(A).

2 38 U.S.C.A. § 4323(d)(1)(B).

An award of one year's front pay was an appropriate remedy to restore a schoolteacher to his rightful position; reinstatement was not appropriate in light of existing acrimony between the parties. [Carpenter v. Tyler Indep. School Dist.](#), 429 F. Supp. 2d 848, 210 Ed. Law Rep. 217 (E.D. Tex. 2006), *aff'd*, 226 Fed. Appx. 400 (5th Cir. 2007).

3 38 U.S.C.A. § 4323(d)(1)(C).

4 [Davis v. Crothall Services Group, Inc.](#), 961 F. Supp. 2d 716 (W.D. Pa. 2013).

5 38 U.S.C.A. § 4323(h)(1).

6 [Davis v. Advocate Health Center Patient Care Exp.](#), 523 F.3d 681 (7th Cir. 2008).

7 38 U.S.C.A. § 4323(h)(2).

Plaintiff employee's costs associated with private mediation could be included in the scope of the award, on application to recover fees and costs in an action under USERRA, where parties used private mediation because defendant employer declined to agree to mediation directed by the court before an attorney on the district's special masters list. [Serricchio v. Wachovia Securities, LLC](#), 706 F. Supp. 2d 237 (D. Conn. 2010), *aff'd*, 658 F.3d 169 (2d Cir. 2011).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 121

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings


2. Enforcement of Rights of Preference Eligible Veterans

a. Complaint and Investigation; Appeal to Merit Systems Protection Board

§ 121. Complaint

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

West's Key Number Digest, [Public Employment](#)  457

A.L.R. Library

[Construction and Application of Improved Redress Provisions of Veterans Employment Opportunities Act of 1998 \(VEOA\), 5 U.S.C.A. ss3330a to 3330c, 42 A.L.R. Fed. 2d 271](#)

A preference-eligible employee who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor.¹ A complaint may also be filed with the Secretary of Labor by a veteran who has been separated from the armed forces under honorable conditions after three years or more of active service and who alleges that an agency has denied such veteran the opportunity to compete for vacant positions for which the agency making the announcement accepted applications from individuals outside its own workforce under merit promotion procedures.²

A complaint under the above provisions must be filed within 60 days after the date of the alleged violation.³ Such complaint must be in writing, be in such form as the Secretary may prescribe, specify the agency against which the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.⁴

Practice Tip:

Technical assistance to a potential complainant with respect to a complaint is available upon request to the Secretary.⁵

Caution:

A preference-eligible veteran's failure to file a complaint about his or her nonselection to a vacant position before appealing to the Merit Systems Protection Board deprives the Board of jurisdiction over the appeal.⁶

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Footnotes

- 1 [5 U.S.C.A. § 3330a\(a\)\(1\)\(A\).](#)
Alleged improprieties by the Office of Personnel Management in making vacancy announcement did not implicate, and so could not have violated, rights specified in the statute that permitted the filing of a complaint with the Secretary of Labor by a preference-eligible veteran alleging a violation of veteran-preference rights. [O'Brien v. Office of Personnel Management](#), 118 Fed. Appx. 484 (Fed. Cir. 2004).
- 2 [5 U.S.C.A. § 3330a\(a\)\(1\)\(B\).](#)
- 3 [5 U.S.C.A. § 3330a\(a\)\(2\)\(A\).](#)
- 4 [5 U.S.C.A. § 3330a\(a\)\(2\)\(B\).](#)
- 5 [5 U.S.C.A. § 3330a\(a\)\(3\).](#)
- 6 [Hill v. Merit Systems Protection Bd.](#), 484 Fed. Appx. 484 (Fed. Cir. 2012).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 122

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

2. Enforcement of Rights of Preference Eligible Veterans

a. Complaint and Investigation; Appeal to Merit Systems Protection Board

§ 122. Investigation; attempted resolution

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

West's Key Number Digest, [Public Employment](#)  481

A.L.R. Library

[Construction and Application of Improved Redress Provisions of Veterans Employment Opportunities Act of 1998 \(VEOA\), 5 U.S.C.A. ss3330a to 3330c, 42 A.L.R. Fed. 2d 271](#)

The Secretary of Labor will investigate each complaint filed with him or her under the statutes pertaining to enforcement of the rights of preference eligible veterans.¹ In carrying out any such investigation, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or agency that the Secretary considers relevant to the investigation.² Also, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.³ In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any federal district court in the jurisdiction of which such disobedience or contumacy occurs for an order enforcing the subpoena.⁴ Upon application, the federal district courts will have jurisdiction to issue writs commanding any person or agency to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation, and

the district courts will have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.⁵

If the Secretary of Labor determines as a result of an investigation,⁶ and based on a preponderance of the evidence,⁷ that the action alleged in the complaint occurred, the Secretary will attempt to resolve the complaint by making reasonable efforts to ensure that the agency specified in the complaint complies with applicable provisions of statute or regulation relating to veterans' preference.⁸ If the Secretary's efforts do not result in the resolution of the complaint, the Secretary will notify the person who submitted the complaint, in writing, of the results of the Secretary's investigation.⁹

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Footnotes

- | | |
|---|------------------------------|
| 1 | 5 U.S.C.A. § 3330a(b)(1). |
| 2 | 5 U.S.C.A. § 3330a(b)(2). |
| 3 | 5 U.S.C.A. § 3330a(b)(3). |
| 4 | 5 U.S.C.A. § 3330a(b)(3). |
| 5 | 5 U.S.C.A. § 3330a(b)(4). |
| 6 | 5 U.S.C.A. § 3330a(c)(1)(A). |
| 7 | 5 U.S.C.A. § 3330a(c)(1)(B). |
| 8 | 5 U.S.C.A. § 3330a(c)(1)(A). |
| 9 | 5 U.S.C.A. § 3330a(c)(2). |

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 123

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

2. Enforcement of Rights of Preference Eligible Veterans

a. Complaint and Investigation; Appeal to Merit Systems Protection Board

§ 123. Election to appeal to Merit Systems Protection Board; pursuit of other remedies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

West's Key Number Digest, [Public Employment](#)  481, 505, 514 to 516, 518

A.L.R. Library

[Construction and Application of Improved Redress Provisions of Veterans Employment Opportunities Act of 1998 \(VEOA\), 5 U.S.C.A. ss3330a to 3330c, 42 A.L.R. Fed. 2d 271](#)

If the Secretary of Labor is unable to resolve a complaint alleging the violation of a preference eligible employee's rights under any statute or regulation relating to veterans' preference, within 60 days after the date on which the complaint is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board prescribes.¹ The governing statute provides that in no event may any such appeal be brought before the 61st day after the date on which the complaint is filed or later than 15 days after the date on which the complainant receives written notification from the Secretary that the Secretary's efforts have not resulted in the resolution of the complaint;² however, there is authority that the time for review is not mandatory and jurisdictional and thus can be subject to equitable tolling.³

Caution:

A preference-eligible veteran's failure to file a complaint about his or her nonselection to a vacant position before appealing to the Merit Systems Protection Board deprives the Board of jurisdiction over the appeal.⁴

In order to appeal to the Merit Systems Protection Board, the complainant must first provide written notification to the Secretary of such complainant's intention to bring such appeal and include appropriate evidence of compliance with such requirement (in such form and manner as the Merit Systems Protection Board may prescribe) with the notice of appeal.⁵

Observation:

Upon receiving notification of the complainant's intention to bring an appeal, the Secretary will not continue to investigate or further attempt to resolve the complaint to which the notification relates.⁶

The above provisions are not to be construed as prohibiting a preference eligible veteran from, in lieu of the administrative redress such provisions make available, appealing directly to the Merit Systems Protection Board from any action which is appealable to the Board under any other law, rule, or regulation.⁷ However, a preference eligible may not pursue such administrative redress at the same time as he or she pursues redress for the underlying violation pursuant to any other law, rule, or regulation.⁸

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Footnotes

- ¹ [5 U.S.C.A. § 3330a\(d\)\(1\)](#).
Alleged improprieties by the Office of Personnel Management in making vacancy announcement did not implicate, and so could not have violated, rights specified in the statute that permitted the filing of a complaint with the Secretary of Labor by a preference-eligible veteran alleging a violation of veteran-preference rights, and therefore, the Merit Systems Protection Board lacked jurisdiction over the issues of whether OPM had issued a fraudulent vacancy announcement and whether it had improperly handled a preference-eligible veteran's inquiries regarding the vacancy. [O'Brien v. Office of Personnel Management](#), 118 Fed. Appx. 484 (Fed. Cir. 2004).
- ² [5 U.S.C.A. § 3330a\(d\)\(1\)](#).

- 3 [Kirkendall v. Department of Army](#), 479 F.3d 830, 42 A.L.R. Fed. 2d 653 (Fed. Cir. 2007).
- 4 [Hill v. Merit Systems Protection Bd.](#), 484 Fed. Appx. 484 (Fed. Cir. 2012).
- Complaint procedures, see § 121.
- 5 5 U.S.C.A. § 3330a(d)(2).
- 6 5 U.S.C.A. § 3330a(d)(3).
- 7 5 U.S.C.A. § 3330a(e)(1).
- 8 5 U.S.C.A. § 3330a(e)(2).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 124

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings


2. Enforcement of Rights of Preference Eligible Veterans

a. Complaint and Investigation; Appeal to Merit Systems Protection Board

§ 124. Compliance order; liquidated damages; costs and fees

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(6)

West's Key Number Digest, [Public Employment](#)  333, 635, 654, 658(3)

A.L.R. Library

[Construction and Application of Improved Redress Provisions of Veterans Employment Opportunities Act of 1998 \(VEOA\), 5 U.S.C.A. ss3330a to 3330c, 42 A.L.R. Fed. 2d 271](#)

If the Merit Systems Protection Board determines that an agency has violated the rights of a preference eligible employee under any statute or regulation relating to veterans' preference, the Board will order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved. If the Board determines that such violation was willful, it will award an amount equal to back pay as liquidated damages.¹

A preference eligible veteran who prevails in a proceeding before the Board will be awarded reasonable attorney's fees, expert witness fees, and other expenses.² Attorney's fees and expenses are not necessarily "unreasonable" if (1) success before the Board was not in some way attributable to the efforts of the successful party's attorney, or (2) services were rendered prior to the attorney's entry of appearance before the Board.³

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Footnotes

- 1 [5 U.S.C.A. § 3330c\(a\).](#)
The appropriate remedy for a violation of a veteran's preference rights under the Veterans Employment Opportunities Act by offering the position of contract specialist to another was an offer of the same position at the same level, not an offer of a higher level position, and thus, the veteran's refusal of the offer rendered moot any remedy other than back pay. [Williams v. Department of the Air Force](#), 524 Fed. Appx. 608 (Fed. Cir. 2013).
- 2 [5 U.S.C.A. § 3330c\(b\).](#)
- 3 [Augustine v. Department of Veterans Affairs](#), 503 F.3d 1362 (Fed. Cir. 2007).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 125

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings

2. Enforcement of Rights of Preference Eligible Veterans

b. Judicial Enforcement Proceedings

§ 125. Election to file suit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(1)

West's Key Number Digest, [Public Employment](#)  791

A.L.R. Library

[Construction and Application of Improved Redress Provisions of Veterans Employment Opportunities Act of 1998 \(VEOA\), 5 U.S.C.A. ss3330a to 3330c, 42 A.L.R. Fed. 2d 271](#)

In lieu of continuing the administrative redress procedure,¹ a preference eligible veteran, or a veteran who has been separated from the armed forces under honorable conditions after three years or more of active service and who alleges that an agency has denied such veteran the opportunity to compete for vacant positions for which the agency making the announcement accepted applications from individuals outside its own workforce under merit promotion procedures, may elect to terminate those administrative proceedings and file an action with the appropriate federal district court not later than 60 days after the date of the election.² Such an election may not be made before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board after the Secretary of Labor is unable to resolve a complaint or after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits of the appeal.³ Such an election must be made, in writing, in such form and manner as the Merit Systems Protection Board prescribes by regulation.⁴ The election will be effective

as of the date on which it is received, and the administrative proceeding to which it relates will terminate immediately upon the receipt of such election.⁵

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Footnotes

- 1 §§ 121 to 124.
- 2 5 U.S.C.A. § 3330b(a).
- 3 5 U.S.C.A. § 3330b(b).
- 4 5 U.S.C.A. § 3330b(c).
- Election to terminate Merit Systems Protection Board proceeding and file suit, see 5 C.F.R. § 1208.24(a).
- 5 5 U.S.C.A. § 3330b(c).

End of Document

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77 Am. Jur. 2d Veterans and Veterans Laws § 126

American Jurisprudence, Second Edition | May 2021 Update

Veterans and Veterans' Laws

Karl Oakes, J.D.

VIII. Employment and Reemployment Rights

F. Assistance, Enforcement, and Investigation of Rights; Actions and Proceedings


2. Enforcement of Rights of Preference Eligible Veterans

b. Judicial Enforcement Proceedings

§ 126. Remedy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Armed Services](#)  122(6)

West's Key Number Digest, [Public Employment](#)  810, 811

A.L.R. Library

[Construction and Application of Improved Redress Provisions of Veterans Employment Opportunities Act of 1998 \(VEOA\), 5 U.S.C.A. ss3330a to 3330c, 42 A.L.R. Fed. 2d 271](#)

If a court determines that an agency has violated the rights of a preference eligible employee under any statute or regulation relating to veterans' preference, the court will order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved.¹ If the court determines that such violation was willful, it will award an amount equal to backpay as liquidated damages.²

A preference eligible veteran who prevails in a judicial enforcement proceeding will be awarded reasonable attorney's fees, expert witness fees, and other litigation expenses.³ The most useful starting point for determining the amount of a reasonable attorney's fees for a prevailing preference eligible veteran is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate; of course, the number of hours compensable may include only time spent in furtherance of the claim.⁴

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Footnotes

- 1 [5 U.S.C.A. § 3330c\(a\)](#).
A veteran not selected for competitive service employment in violation of the veteran's preference rights was entitled to compensation for loss of wages and benefits, despite the fact that the veteran was employed by the federal government in a lower-grade position during the time period he otherwise would have held his desired position, where it was undisputed that the agency would have selected the veteran but for such violation. [Marshall v. Department of Health and Human Services](#), 587 F.3d 1310 (Fed. Cir. 2009).
- 2 [5 U.S.C.A. § 3330c\(a\)](#).
- 3 [5 U.S.C.A. § 3330c\(b\)](#).
- 4 [Augustine v. Department of Veterans Affairs](#), 503 F.3d 1362 (Fed. Cir. 2007).

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